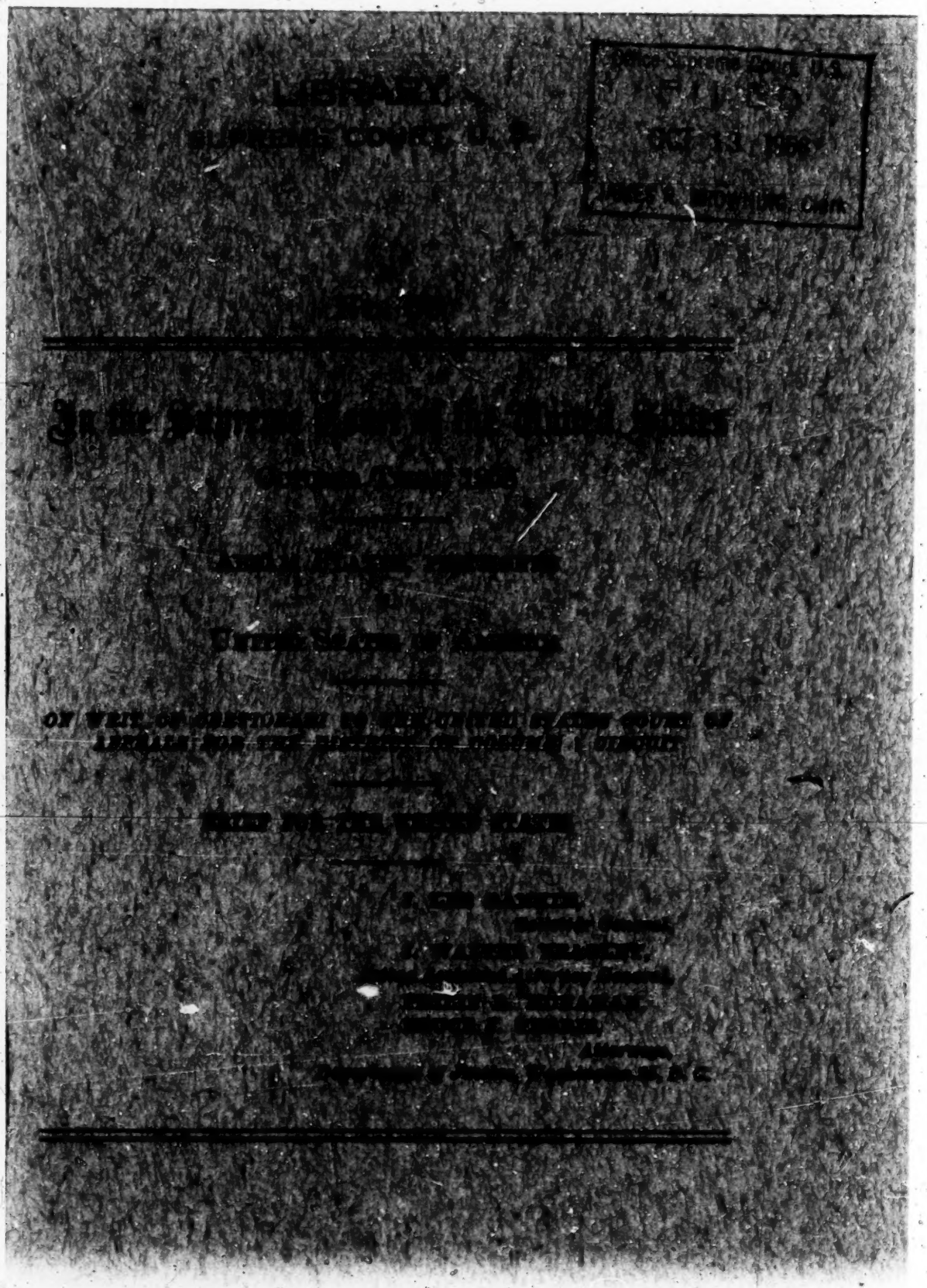

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court denying petitioner's motion for judgment of acquittal notwithstanding the verdict or in the alternative for a new trial (R. 14–20) is reported at 112 F. Supp. 669.

The two prevailing (R. 116–118, 118) and two dissenting opinions (R. 118–120, 120) in the Court of Appeals, sitting *en banc,* which were rendered following this Court's remand of the case (R. 115; 354 U. S. 929) for consideration in the light of *Watkins v. United States,* 354 U. S. 178, have not yet been reported. The original majority (R. 96–110) and two dissenting opinions (R. 110–114, 114) in the Court of

Appeals, likewise sitting *en banc*, are reported at 235 F. 2d 821.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1958 (R. 120–121). The petition for a writ of certiorari was filed on April 29, 1958, and was granted on June 9, 1958 (R. 122). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366, 81st Congress, 2d session, which created the Subcommittee on Internal Security and defines its powers, is sufficiently definite to support the use of compulsory process.

2. Whether the inquiry by the Senate Subcommittee on Internal Security into the extent of Communist infiltration into the United Public Workers of America had a valid legislative purpose.

3. Whether the group's membership lists, which petitioner, its president, refused to make available to the Subcommittee, were in fact pertinent to the inquiry.

4. Whether under the Rules of the Senate a properly constituted quorum ruled upon petitioner's objection, and whether petitioner properly raised before

[1] Judges Bastian and Burger took no part in the consideration or decision of the case on either occasion. In both instances, the court divided 4 to 3 in favor of affirming the conviction, the same judges comprising the majority and minority on each occasion. The majority originally wrote a single opinion, but on the remand Judge Prettyman wrote an opinjon which was concurred in by Judges Miller and Danaher, and Judge Washington indicated in a brief concurring opinion that he "concur[red] in the result." See *infra*, pp. 4–5.

the Subcommittee the issue of the absence of a quorum to rule upon his objection to being required to produce the membership lists.

5. Whether the fact that petitioner was not in terms informed by the Subcommittee of the basis of pertinency of the membership lists was a bar to his conviction under 2 U. S. C. 192 for refusal to produce the lists, he having made no objection to producing them on grounds of lack of pertinency.

6. Whether, after petitioner had apprised the Subcommittee of his objections to being required to comply with its demand for the membership lists, the Subcommittee's direction to produce the lists "according to the terms of the subpena" met the requirements of *Quinn* v. *United States*, 349 U. S. 155.

7. Whether, since petitioner deliberately disabled himself from producing the membership lists by not bringing them to the hearing, he had standing at his trial to rely upon grounds for refusal to produce which related solely to events occurring at the hearing itself.

STATUTE, RESOLUTION, AND RULE INVOLVED

2 U. S. C. 192 (Rev. Stat., § 102, as amended), the pertinent provisions of Senate Resolution 366, 81st Cong., 2d sess., adopted December 21, 1950 (96 Cong. Rec. 16872), and Rule XXV (3) of the Standing Rules of the Senate, as amended by Senate Resolution 180, 81st Cong., 2d sess., adopted February 1, 1950 (96 Cong. Rec. 1284), are set forth in the Appendix, *infra*, pp. 85–87.

STATEMENT

Petitioner, on November 20, 1952, was charged in a two-count indictment (R. 2–3), returned in the United States District Court for the District of Columbia, with having willfully refused, in violation of 2 U. S. C. 192 (Rev. Stat., § 102, as amended) (Appendix, *infra*, p. 85), to produce, pursuant to a subpoena *duces tecum* issued by the Subcommittee on Internal Security of the Senate Committee on the Judiciary, records of the United Public Workers of America showing the names and addresses of members of that organization who were employed by the United States Government (count 1) and by any state, county, or municipal government in the United States (count 2). Found guilty by a jury on both counts (R. 94), petitioner was sentenced generally to two months' imprisonment and to pay a fine of $1,000 (R. 20–21). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was, on June 21, 1956, affirmed by that court sitting *en banc*, by a divided vote, Judges Bastian and Burger taking no part in the consideration or decision of the case (R. 96–114; 235 F. 2d 821). The majority opinion was written by Judge Miller and concurred in by Judges Prettyman, Washington, and Danaher (R. 96–110). Chief Judge Edgerton and Judge Bazelon joined in one dissenting opinion (R. 110–114) and Judge Fahy dissented in a separate opinion (R. 114).

Thereafter, this Court, on June 24, 1957, on petition for a writ of certiorari to review this judgment, granted the petition, vacated the judgment of affirmance, and remanded the case to the Court of Appeals

"for consideration in light of *Watkins* v. *United States,* 354 U. S. 178" (354 U. S. 929). The case was thereafter rebriefed and reargued in the Court of Appeals, which again sat *en banc.* On April 3, 1958, that court again affirmed the judgment of conviction (R. 120–121), with Judges Bastian and Burger taking no part. Judge Prettyman wrote an opinion in which Judges Miller and Danaher joined (R. 116–118). Judge Washington indicated in a brief concurring opinion that he "concur[red] in the result, finding no impediment in *Watkins,* or other controlling authority, to affirmance of the conviction" (R. 118). Judge Fahy wrote a dissenting opinion in which Chief Judge Edgerton and Judge Bazelon joined[2] (R. 118–120), and Judges Edgerton and Bazelon, in addition, indicated that they thought the conviction should be reversed for the "additional reason stated in [their] former dissent"[3] (R. 120).

The pertinent facts may be summarized as follows:

On December 21, 1950, shortly following the enactment of the Internal Security Act of (September 23),

[2] This was essentially an expansion of Judge Fahy's original dissenting opinion, which expressed the view that the Subcommittee had not empowered a single member to rule upon objections to the production of documents called for by a subpoena *duces tecum*—a view which was thought by the dissenting judges to have been "fortifie[d]" by *Watkins* (R. 119).

[3] The additional reason referred to was, essentially, the rule enunciated in *Quinn* v. *United States,* 349 U. S. 155, 165–166, according to which, where a witness before a congressional committee objects to a committee question, he must, before he may be held liable to conviction under 2 U. S. C. 192 for refusal to answer, be clearly apprised that the committee has overruled his objection or objections, *i. e.*, that the committee demands his answer notwithstanding his objections.

1950, 64 Stat. 987, the Senate authorized and directed its Committee on the Judiciary, "or any duly authorized subcommittee thereof," to make a "complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence" (S. Res. 366, 81st Cong., 2d sess., 96 Cong. Rec. 16872; Appendix, *infra*, p. 86; R. 32–33). Pursuant to this authorization, there was created, in January 1951, a subcommittee of the Committee on the Judiciary popularly referred to as the Senate Internal Security Subcommittee[*] (R. 33–34). Seven Senators were named to the Subcommittee, of which Senator McCarran was made Chairman (R. 34). Shortly following its organization, in January 1951, at a session at which all members except one were present, the Subcommittee, pursuant to the authority conferred by Sec-

[*] The formal name of the Subcommittee is the "Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the [Senate] Committee on the Judiciary."

tion 2 of Senate Resolution 366 and subsection 3 (b) of Rule XXV of the Standing Rules of the Senate (as amended by S. Res. 180, 81st Cong., 2d sess.) (see Appendix, *infra*, pp. 86–87), adopted a resolution to the effect that a single member would constitute a quorum for the purpose of taking testimony (R. 34–35.)

In or about April, 1951, the Subcommittee commenced a series of public hearings in connection with an investigation it was conducting into the affairs and personnel of the United Public Workers of America (the "UPWA"), which organization, the committee's information tended to show, (1) was heavily infiltrated, at least at the top, by members of the Communist Party, and (2) had substantial numbers of members who were currently in the employ of the Federal Government (R. 50–53; Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong., 1st sess., on *Subversive Control of the United Public Workers of America*, Part II, April 12, 13, May 11, 1951, p. 135 *ff.*)

On September 13, 1951, the Chairman of the Subcommittee issued a subpoena *duces tecum* directing petitioner, who then was (and had been since 1946) the National President of the UPWA (R. 39), to appear before the Subcommittee and bring with him such records of the union as would show the total amount of funds then in its possession, the sources of its funds, their place of deposit, the names of all organi-

zations to which the union had contributed within the preceding twelve months, and the names and addresses of all members of the union then in the employ of the Federal Government and the names and addresses of all members then in the employ of any state, county, or municipal government in the United States (R. 63–64). At petitioner's trial, Richard Arens, the staff director of the Subcommittee at the time of petitioner's appearance before it (R. 62), at a hearing before the court in the absence of the jury for the purpose of inquiring into the pertinency to the subject under inquiry by the Subcommittee of the records which petitioner was called upon to produce, was asked "why the committee subpoenaed Mr. Flaxer and his union records" (R. 50–51). Mr. Arens, replying, referred to "the resolution under which the committee was operating; that is, to maintain a kind of surveillance over the administration and operation of the internal security laws of the country, and to ——", at which point he was interrupted by an objection by defense counsel (R. 51). Government counsel said that he thought he could "shorten it up" (R. 51), following which, in reply to counsel's questions, Mr. Arens testified: that prior to the issuance of the subpoena to petitioner there had appeared before the Subcommittee a number of witnesses who had given testimony concerning petitioner (R. 51); that these witnesses had identified petitioner as a member of the Communist Party with whom they had associated in the Party (R. 51–52); that one witness had identified petitioner as a "tried fanatic of the

communist party" (R. 52);[5] that the UPWA, according to other testimony adduced before the Subcommittee, "was an organization with some 35,000 to 50,000 [members]—the estimates varied—who were employed in various governmental agencies—federal, state, county, municipalities" (R. 53); that petitioner, "a hard core member of the communist party," was, according to the committee's information, the president of the UPWA; that the secretary-treasurer, one Ewart Guinier, had likewise been identified before the Subcommittee as a member of the Communist Party,[6] as had "certain of the members of the executive board" and a man who had in the recent past been negotiations director of the UPWA (R. 53).[7]

Petitioner appeared before an executive session of the Subcommittee pursuant to the aforesaid subpoena on October 5, 1951 (R. 37). By designation of the Chairman of the Subcommittee, Senator Watkins was the only Subcommittee member present, *i. e.*, he "com-

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[5] See Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong., 1st sess., on *Subversive Control of the United Public Workers of America*, Part I, July 27, August 9, 23, 25 and 29, September 28, October 5 and 10, December 14, 1951, pp. 35–36.

[6] Guinier was described as being "under Communist Party discipline" and "one of the most effective Stalinist operatives that there is" (Hearings, etc. (see preceding footnote), p. 36). In his own testimony before the Subcommittee petitioner indicated that he and Guinier were the only "national officers" of the UPWA (R. 49).

[7] Since the union, representing governmental employees, had no bargaining rights, officers of the union were not required to sign non-Communist affidavits in order to represent employees (R. 44–45). See 29 U. S. C. 152 (2), (3), and (5).

prise[d] the subcommittee that day" (R. 37). Immediately after being sworn, petitioner, who was represented by counsel (R. 39), objected to proceeding further on the ground that there was "no quorum" present (R. 38). The objection was overruled by Senator Watkins, who stated (R. 38):

> We do have a quorum. Under our rules, which we are to make, one present makes a quorum.

Petitioner said he was "not sure about that" and that he wished "the record [to] show that I object to the fact that I think there is no quorum" (R. 38). Senator Watkins, remarking that the record would "show [his] statement," directed counsel to proceed (R. 39). There was no further discussion of the matter of a quorum at any time during the remainder of petitioner's testimony.

Pursuant to the subpoena, petitioner produced the several financial records of his union which were called for (see *supra*, pp. 7–8) (R. 39–41), but failed to produce the membership lists (R. 41). Explaining his failure to produce the membership records, he read the following prepared statement (R. 41–42):

> The demand for the production of this item raises a number of profoundly serious issues. From the very beginning of the union movement in this country, the rights of unions to the privacy of their membership records * * * has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American labor that the right to join a union is an empty right unless the fact of membership can be kept private.

Throughout our history, employers and anti-labor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the LaFollette committee. After bitter struggles in and out of the Halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the National Labor Relations Board and of our Federal courts have upheld that right. Indeed, the mere query by an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft-Hartley Act.

Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict

with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists.

Following his reading of this statement, petitioner was asked if he "ha[d] such a list" (R. 42). He replied that he had "no such list with" him (R. 42). Asked if the UPWA "ha[d] the information available," he replied that "we generally have such information" (R. 42). In response to further interrogation, he testified that there were "about 35,000 members" in his union (R. 43); that, of these, "about 5 percent" were in the employ of the Federal Government (R. 43); that "the other 95 percent" were employed in state, county, and municipal governments (R. 44); and that he was able to give only a "general idea" as to the state agencies and state areas in which these members were located (R. 44). He named three federal agencies—the Bureau of Engraving, Post Office, and Veterans' Administration—in which the "main bulk" of the federal-employee membership was concentrated (R. 43, 45–46), but declined to name other federal agencies where the union had members because he did not have "the facts" (R. 46).

Counsel then asked that petitioner be directed to produce the membership records in accordance with the subpoena *duces tecum* (R. 46–47) and the following transpired (R. 47):

Senator WATKINS. Do you understand the request made of you?

Mr. FLAXER. Yes; I do.

Senator WATKINS. Do you stand on your statement that you refuse to produce those?

Mr. FLAXER. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally——

Mr. ARENS [counsel to the Subcommittee]. But you do have the information?

Mr. FLAXER. In a general sense, I think I have the information.

Mr. ARENS. And you have not complied with the command of the subpena to produce that information.

Mr. FLAXER. I think it is an improper command, sir.

Senator WATKINS. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. FLAXER. That is the reason I haven't got them.

Senator WATKINS. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Petitioner at this point renewed his contention that the Subcommittee was "infringing on a right that workers in America have, including Federal employees" (R. 47). In response to further questioning he told the Subcommittee that he "imagine[d]" that the membership lists called for by the subpoena could be prepared within a week (R. 49). The committee counsel then suggested to the committee that petitioner be ordered to produce the information and

transmit it to the committee within ten days (R. 49). Thereupon, the following occurred (R. 49):

> Senator WATKINS. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Petitioner then asked the Subcommittee to "reconsider that" on the ground that "organized labor in America will recognize in this a break in the wall that they have built up over a half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists" (R. 49).

A moment later, Senator Watkins, in apparent reference to these last-quoted remarks of petitioner, said (R. 49):

> May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

The following colloquy then occurred (R. 50):

> Mr. FLAXER. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.
>
> Senator WATKINS. I am not promising you they would not be made public, because I do not

think the Government has to make such a promise to get the information.

When petitioner indicated, at this point, that he was about, once again, to renew his argument as to why he should not be compelled to produce the membership lists, Senator Watkins interrupted him and the following transpired (R. 50):

Senator WATKINS. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. FLAXER. I haven't got them. I don't feel capable of producing them.

Senator WATKINS. You said you could do it within a week.

Mr. FLAXER. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. ARENS. The information is available to you?

Mr. FLAXER. Yes.

Mr. ARENS. But you have declined to produce it; is that correct?

Mr. FLAXER. I haven't produced them.

Mr. ARENS. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. FLAXER. I will have to take that under consideration.

Senator WATKINS. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

The Subcommittee never received either of the membership lists in question (R. 71).[8]

At petitioner's trial, prior to the introduction of any evidence before the jury, the question of the "pertinency of the records sought" (R. 61) was inquired into at a preliminary hearing before the court in the absence of the jury (R. 30–61). Following this hearing, at which Mr. Arens testified in detail with respect to the information in the possession of the Subcommittee concerning petitioner, the UPWA, the Communist Party membership of the top officials of this union (including petitioner), and the fact that a substantial percentage of the members of the union were currently in the employ of the Federal Government (*supra*, pp. 8–9), the court ruled that it was "the view of the Court that the information sought [was] pertinent to the subject under inquiry by the committee" (R. 62). In reaching this conclusion, the

[8] At petitioner's trial, the defense introduced in evidence a copy of a letter, dated October 13, 1951 (eight days following petitioner's appearance before the Subcommittee), addressed by petitioner to Senator Watkins (R. 75). In this letter he repeated, *verbatim*, the text of the prepared statement he had read to the Subcommittee on October 5 (see *supra*, pp. 10–12) (R. 76–77). He further wrote (R. 77):

"During the time that has elapsed since the date of that hearing, I have again given due consideration to the committee's request for those membership lists and have come to no other conclusion than that given to you on October 5th, as quoted above; and, therefore, again reiterate my request that the committee withdraw its demand for the membership lists."

While, according to the defense's evidence, the foregoing letter was mailed to Senator Watkins (R. 75), Senator Watkins never received the letter (R. 74–75). Petitioner himself did not take the stand at his trial.

court adverted to the terms of Senate Resolution 366, the nature of the Communist Party as being "not like other political parties in its utilization of positions of union leadership," and to the "common knowledge" that Communists "utilize positions of power in labor organizations * * * for purposes that are not necessarily those of union interests but rather for the promotion of the objects of the communist party" (R. 61–62).

Following this preliminary determination of pertinency by the court, the jury was recalled (R. 62) and the trial proceeded with the adduction of evidence of petitioner's refusal to produce the subpoenaed membership lists (R. 62–72).

SUMMARY OF ARGUMENT

In Points I–III, we show that Congress validly empowered the Senate Internal Security Subcommittee to compel production of the membership lists. In Points IV–VII, we discuss the validity of the procedures followed at the hearing itself.

I

The resolution establishing the Senate Subcommittee on Internal Security is sufficiently definite to support the Subcommittee's use of compulsory process.

1. Petitioner's contention that the resolution is not sufficiently definite assumes that this Court, in *Watkins* v. *United States*, 354 U. S. 178, invalidated the resolution establishing the House Committee on Un-American Activities as too vague to support the use

by the Committee of compulsory process. But it is clear from a number of considerations that *Watkins*, while it was critical of that resolution, did not hold it to be invalid. Such a holding would have been so far-reaching in its results that the Court would certainly have made it explicit and not have left the matter to inference. Also, if such had been the Court's holding, the extended discussion in the opinion relating to such matters as the pertinency of the specific questions put to Watkins and the necessity that a witness be apprised on demand of the basis of pertinency of the questions propounded would have been superfluous. Furthermore, the *Barenblatt* case, which involved the same resolution, would have been *reversed* rather than "remanded for consideration in light of" *Watkins*, had such been the Court's holding. And Mr. Justice Frankfurter's concurring opinion in *Watkins*—stating his understanding of the Court's holding—does not at all indicate the holding to have been so broad.

2. In any event, the resolution establishing the Senate Subcommittee on Internal Security is valid even if the House Committee's authorizing resolution is not, since the former is considerably more precise than the latter. The first two clauses of the Senate resolution—authorizing the Senate Subcommittee to carry on a continuing study and investigation of the administration of the Internal Security Act of 1950 and other laws relating to the internal security of the United States—clearly are not subject to the criticism of the House resolution found in the *Watkins* opinion, as petitioner recognizes by his failure seriously to dispute the point. The third clause—directing the

making of a continuing study of the extent, nature, and effects of "subversive activities" in the United States, "including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement * * *"—does not include either the term "un-American" or the phrase "principle of the form of government as guaranteed by our Constitution," criticized as indefinite by this Court in *Watkins*. In its context the term "subversive activities" is not without defined content, and the "including, but not limited to" clause does not render the whole clause unacceptably vague in view of the rule of statutory construction that the meaning of general language is to be confined to things of the same general class as those specifically enumerated.

Since the strict standards of definiteness applicable to criminal statutes are inapplicable to resolutions establishing congressional committees, and since the resolution here in issue compares favorably from the standpoint of definiteness with the resolutions establishing other committees of the Congress, petitioner's challenge to the validity of the present resolution cannot be sustained.

II

The Subcommittee's investigation of petitioner's union, with a view to ascertaining the extent to which it had been infiltrated by members of the Communist Party, had a valid legislative purpose.

1. *Watkins* did not overturn the established principle that committees of Congress are normally pre-

sumed to act pursuant to a valid legislative purpose when conducting investigations within the range of their constitutional powers. And *Watkins* recognized and reaffirmed the principle that congressional committees have the right to inquire into private matters when carrying out a proper investigation pursuant to such purpose. Its relevant teaching is simply that the compulsory disclosure by an unwilling witness before a congressional committee of private matters will not be sanctioned where it appears that the inquiry has no legislative purpose or the mere semblance of such a purpose.

2. Here, the public need for the information which petitioner withheld overwhelmingly overbalanced the private rights allegedly affected. The Subcommittee had information that petitioner's union was penetrated at the top by members of the Communist Party and that its top leader—petitioner himself—was a "hard core member" of the Party. Thus the union was, or very possibly was, a "Communist-front organization" as defined by the Internal Security Act of 1950—the administration and enforcement of which was the Subcommittee's peculiar concern under its charter. There were also grounds for investigating whether substantial numbers of the union's members were members of the Communist Party. And since many of the members of the union were admittedly employees of the Federal Government, the committee had cause to inquire into the possibility that members of the union who were also members of the Communist Party were at that very time in the employ of the Federal Government. The committee's action in sub-

poenaing the membership records of the union was a reasonable and logical step in its investigative process.

3. That Congress had a keen and continuing interest at the time here relevant (October 1951) in informing itself with respect to whether members of the Communist Party held positions of trust and influence in the Federal Government and in the enactment of legislation dealing with such employment is not subject to doubt. Cf. Section 9A of the Hatch Act (5 U. S. C. 118j) and Sections 5 (a) (1) and 15 (c) of the Internal Security Act (50 U. S. C. 784 (a) (1), 794 (c)).

4. That Congress, through its appropriate committees, has the *power* to inquire into the subjects of Communism and the Communist Party as an adjunct to its power to legislate with respect thereto, is equally undeniable. Since Congress unquestionably has this power, the courts have repeatedly upheld congressional inquiries into Communist leadership and infiltration of organizations and industries far less intimately connected with the Federal Government and the nation's security than petitioner's union appeared to have been at the time here in issue. Nor does the fact that the inquiry goes into the names of individuals invalidate it, since "personnel is part of the subject" (*Barsky* v. *United States,* 167 F. 2d 241, 246 (C. A. D. C.), certiorari denied, 334 U. S. 843). Communist leadership and infiltration of a union having among its members a substantial number of Federal employees would be a matter of far graver concern to the Congress than mere inefficiency or even malfeasance in the administration of the affairs of the

Federal Government—a matter with which Congress has always had a deep and abiding concern, the legitimacy of which has never been questioned.

While it is not essential to show that legislation has actually been recommended by a committee to prove that it has been pursuing a valid legislative purpose, the fact that legislation was proposed as a result of the investigation goes far toward establishing the existence of such a purpose. As a direct result of the 1951 investigations of labor unions, including that of petitioner's union, the Internal Security Subcommittee recommended and Congress ultimately passed the Communist Control Act of 1954—one provision of which amended the Internal Security Act of 1950 so as to deny to any labor organization found by the Subversive Activities Control Board to be "Communist-infiltrated" (as therein defined) all rights and benefits which it might otherwise enjoy under the National Labor Relations Act.

III

The membership lists were in fact pertinent to the inquiry.

1. The names of the members of petitioner's union, which the subpoena called for, were pertinent to the subject of the Subcommittee's inquiry since they could be used to check against the names of persons known or believed to be members of the Communist Party to determine the extent of Communist infiltration into the union. That the subject of the inquiry was Communist infiltration of the union is manifest from the entire tenor of the questions which the Subcommittee asked, and was known to petitioner, who made no ob-

jection on grounds of pertinency. It is unimportant that the committee did not formally state for the record how it proposed to use the membership list, since the committee was never asked by petitioner to elucidate its purpose in demanding the list. It is sufficient if it could reasonably have been the committee's purpose to use the list as a check list. The results of the committee's inquiry into the names of the members of the union in order to ascertain the extent of Communist infiltration would bear directly on the kind of remedial legislation, if any, which the committee would ultimately propose.

2. The same considerations which warranted the committee in inquiring into whether Federal-employee members of petitioner's union were members of the Communist Party—*viz.*, its concern over the possibility of there still being Communists in the Federal Government and the threat to the nation's security which would thereby be posed—also justified it in inquiring into whether the state- and municipal-employee members of the union were Party members. See Article IV, Section 4, of the Constitution (requiring the United States to guarantee to every State a republican form of government); Section 2 (15) of the Internal Security Act (50 U. S. C. 781 (15)); *Pennsylvania* v. *Nelson*, 350 U. S. 497, 505 (recognizing seditious conduct against the states as a matter of "vital national concern").

3. *National Assn. for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, presents only surface similarities to this case. The decisive aspect of that case was the utter absence of a showing of any

public need for the disclosure of the names of the members of the N. A. A. C. P. resident in Alabama. Here, the public end which was sought to be served by the demand for the membership list of petitioner's union is clear, and outweighed the members' interest in preserving their anonymity.

IV

The Subcommittee acted with a duly authorized quorum since Senator Watkins' admitted power to conduct the hearing and take petitioner's testimony necessarily included the power to rule upon petitioner's objections to production of the subpoenaed records.

1. Senator Watkins was not a one-member subcommittee of the Internal Security Subcommittee, *i. e.*, he was not a subcommittee of the Subcommittee. He was, for the purpose of conducting the hearing and taking testimony, a one-man quorum of the Internal Security Subcommittee itself. The problem, therefore, is not one of ascertaining the scope of a "charter" of a "one-member subcommittee" of a Subcommittee, but simply to give a sensible meaning to a committee resolution providing that a single member of the committee will constitute a quorum for a specific purpose, *viz.*, "for the purpose of taking sworn testimony."

2. The legislative history of the pertinent resolution (S. Res. 180, 81st Cong., 2d sess., amending Senate Standing Rule XXV (3)) supports our interpretation of the Rule as permitting a one-member quorum

of a committee to rule upon a witness' objections to producing subpoenaed documents. That history indicates that the amendment was designed to permit less-than-normal quorums of committees to *conduct hearings*. Reasonably construed, and in the light of this legislative history, the power which was lodged in Senator Watkins as a one-member quorum of the Subcommittee to "take sworn testimony" included the power to receive subpoenaed documents as a power incidental and normally ancillary to the taking of testimony. And his power to receive such documents included the authority to pass upon objections to their production, for the same reason that his power to take oral testimony included the power to pass upon objections to the requiring of such testimony.

If, contrary to our contention, it was the intent of the Senate to have the full Subcommittee pass upon a witness' objections to producing subpoenaed records, petitioner failed properly to raise the issue of the absence of a quorum to rule upon his objections, with the consequence—see *United States* v. *Bryan*, 339 U. S. 323, 332–334—that the point was waived and was not available to petitioner at his trial. For, while petitioner raised a point of "no quorum" at the outset of his appearance before the Subcommittee (which was overruled, and properly so, as petitioner does not dispute), he made no distinction between a quorum for the purpose of taking testimony and a quorum for the purpose of ruling upon his objection to the production of the subpoenaed records. In short, if petitioner is correct that there is such a distinction, he

failed to object to the absence of a quorum in the manner which *his* interpretation of the Resolution would require.

3. There is no danger of abuse if the Senate Rules are construed as authorizing one-man committee quorums to pass upon a witness' objections to the production of subpoenaed records. Petitioner's objections were necessarily considered by the Subcommittee as a whole, by the parent Committee on the Judiciary, and indeed by the Senate itself before petitioner's contempt was certified to the United States Attorney for prosecution.

V

The fact that petitioner was not in terms informed of the basis of pertinency of the records demanded is immaterial since he made no objection on grounds of pertinency.

The making of such objection is a necessary prerequisite to requiring the committee to explain the basis of pertinency. *Watkins* v. *United States,* 354 U. S. 178, 214–215. Petitioner never objected on grounds of pertinency. He objected on the ground that being required to produce the records would constitute an invasion of the union's and union members' right of privacy. But this was not equivalent to objecting on grounds of pertinency, any more than invoking one's privilege against self-incrimination is equivalent to objecting on grounds of pertinency. In each case the objection proceeds on the basis of an overriding constitutional right which it is claimed must be honored irrespective of pertinency, and indeed assumes pertinency.

Petitioner's statement that the records would be "wholly irrelevant, *if you say they are not to be made public*" did not, in its context, constitute an objection on grounds of pertinency. Certainly it was not such a clear-cut raising of the issue of pertinency as to require the Subcommittee, as a prerequisite to a successful contempt prosecution, to explain to petitioner in detail the logical nexus between the records sought and the subject of the inquiry.

In any event, the pertinency of the records had been made to appear with clarity. In these circumstances no explanation of the basis of pertinency was necessary under *Watkins* even if it be assumed, *arguendo*, that petitioner's objections included a challenge of the records' pertinency.

VI

Petitioner was clearly ordered to produce the subpoenaed records pursuant to the subpoena; his reliance on *Quinn* v. *United States*, 349 U. S. 155, 165–166, is, accordingly, misplaced.

1. The committee, after having been fully apprised by petitioner of his objections to producing the membership lists in accordance with the terms of the subpoena, directed him to "produce those records according to the terms of the subpena." The subsequent order to produce the records within ten days did not constitute rescission of the original order, but represented a fresh attempt on the part of the committee to obtain the records.

2. While it is unlikely that petitioner would have been cited for his contempt of October 5th (the date

of his appearance before the committee) if he had obeyed the committee's second order, that fact is immaterial. Obedience to the second order might be considered as acceptance by petitioner, in effect, of an opportunity, extended to him by the committee, to purge himself of his initial contempt. But since he did not accept such opportunity, there is no need to theorize as to what the legal effect would have been of compliance by petitioner with the second order.

3. Implicit in the jury's verdict, according to the instructions which it received, was a finding that petitioner knew he had been ordered to produce the records on October 5th and deliberately refused to do so. This finding on this issue must be accepted as dispositive.

VII

Since petitioner deliberately disabled himself from producing the membership lists by not bringing them to the hearing, thereby evidencing his intent not to produce them under any circumstances, he had, in any event, no standing at his trial to rely upon grounds for refusal to produce which were related solely to events occurring at the hearing. *United States* v. *Bryan*, 339 U. S. 323. The *Bryan* decision and other decisions of this Court stand for the proposition that a witness' objections to questions or to demands for production should be considered by the courts only where it appears that he would have answered the questions or produced the records but for those objections. But, even if, to petitioner's satisfaction, the full Subcommittee had been at the hearing (Point IV) and had fully explained to him

exactly how the lists were pertinent to the subject under inquiry (Point V) and had categorically directed that he deliver the subpoenaed lists then and there (Point VI), petitioner would still have refused to do so—indeed could not have done otherwise in view of his failure previously to equip himself—because, having regarded the demand as an "improper command," he had made up his mind in advance not to comply with this portion of the subpoena although he did comply with other portions of that subpoena. The principle of the *Bryan* case is therefore fatal to petitioner's present reliance on grounds having no relationship to the real basis for his refusal to obey the subpoena.

ARGUMENT

Introduction

Petitioner's contentions fall into two major categories. The first category relates to whether Congress validly empowered the Senate Internal Security Subcommittee to compel production of the membership lists. Encompassed in this class are the questions of whether: (I) the resolution delegating authority to the Subcommittee was sufficiently definite to support the Subcommittee's use of compulsory process; (II) the hearings had a valid legislative purpose; (III) the data sought was in fact pertinent to the inquiry. The second category relates to the procedures followed at the hearing itself. Involved here are the questions whether: (IV) the Subcommittee acted with a duly authorized quorum; (V) the petitioner, who made no objection on grounds of pertinency, may complain of the failure specifically to inform him

of the basis of pertinency; (VI) the Subcommittee directed the witness to comply forthwith "according to the terms of the subpoena". In discussing this second category of contentions, we note (Point VII) that petitioner had failed to bring the membership lists to the hearing as required by the subpoena and, therefore, had obviously determined, in advance of the hearing and regardless of what was said or done at the hearing itself, to defy the Subcommittee, and urge that he therefore lacked standing to complain of events which were not the true basis for his refusal to comply. We submit, in sum, that the petitioner was accorded all the procedural protections to which he was entitled and that his contentions are without merit.

I. The Resolution establishing the Senate Subcommittee on Internal Security is sufficiently definite to support the Subcommittee's use of compulsory process

Petitioner urges (Br. 38–43) that "the resolution establishing the Senate Subcommittee on Internal Security is too vague to support a conviction for contempt" (Br. 38). This contention is based on the suppositions (1) that this Court, in *Watkins* v. *United States*, 354 U. S. 178, struck down the resolution establishing the House Committee on Un-American Activities as "too broad and nebulous to support committee use of compulsory process" (Br. 38), and (2) that the resolution establishing the Senate Subcommittee on Internal Security—Senate Resolution 366, 81st Cong., 2d sess. (Appendix, *infra*, pp. 85–87)—is no more precise than the House Committee's resolution. Neither supposition is correct.

1. That the *Watkins* decision did not invalidate the resolution establishing the House Committee on Un-American Activities as too vague to support committee use of compulsory process is manifest, we submit, from a reading of the opinion.

The reasons why it is apparent that this Court did not invalidate the resolution are set forth in *Barenblatt* v. *United States*, 252 F. 2d 129, 131 (C. A. D. C.), pending on certiorari, No. 35, this Term. (See the Brief for the United States in No. 35, at pp. 32–34.) It is there noted (at 131) that if this Court in *Watkins* "had intended to strike down the resolution [creating the House Committee on Un-American Activities], it would have said so in so many words. It would not have left so vital an issue to inference or interpretation." For "[t]he far-reaching result of such a holding would be that the Committee, established by action of the entire House of Representatives, would be rendered helpless and would not even be able to summon a witness, much less have him testify" (*ibid.*). And "nowhere in the Watkins opinion does the Court use language essential to effectuate [such a] result * * *" (*ibid.*). Moreover, had this Court "struck down the resolution creating the Committee the matter would have been ended, without the further, extended discussion found in Watkins" (*ibid.*).

Furthermore, as *Barenblatt* also observes, this Court "cited in Watkins a number of cases, both in [this] Court and in Courts of Appeals, bearing on convictions sustained under the same resolution," without any intimation that such cases should have been or could have been "decided by the simple process of

voiding the resolution establishing the Committee"[9] (252 F. 2d at 132). And "* * * it is reasonable to assume that, had the resolution under which both Watkins and Barenblatt were questioned been stricken in its entirety, this case [*i. e., Barenblatt*] would have been *reversed* on authority of Watkins rather than *remanded* for consideration 'in light of' that opinion" (252 F. 2d at 132; emphasis in the original).

Finally, we note that Mr. Justice Frankfurter's concurring opinion in *Watkins* (354 U. S. at 216–217)—stating his understanding of the Court's opinion, in which he joined—does not indicate the holding to be that the Committee's charter was void or wholly incapable of supporting a contempt conviction.

2. In any event, the resolution establishing the Senate Subcommittee on Internal Security—Senate Resolution 366, 81st Cong., 2d sess. (Appendix, *infra*, pp. 85–87)—is considerably more precise than the resolution creating the House Committee on Un-American Activities which the Court criticized in *Watkins*.

Clauses (1) and (2) of the Senate resolution authorize and direct the Subcommittee to make a "complete and continuing study and investigation" of the "administration, operation, and enforcement of," respectively, "the Internal Security Act of 1950" and "other laws relating to espionage, sabotage, and the

[9] See, *e. g.*, *Quinn* v. *United States*, 349 U. S. 155; *Emspak* v. *United States*, 349 U. S. 190; *Bart* v. *United States*, 349 U. S. 219; *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Josephson*, 165 F. 2d 82 (C. A. 2), certiorari denied, 333 U. S. 838 (cited in *Watkins*, 354 U. S. at 196, 197, 200, 202, 203, 209).

protection of the internal security of the United States." The area of the Subcommittee's investigative authority thus delineated is certainly sufficiently definite to serve as a valid congressional resolution, and petitioner, significantly, does not seriously dispute the point (Br. 40). "Bare recital of this portion of the resolution," as the court below observed in *Sacher* v. *United States*, 252 F. 2d 828, 832 (C. A. D. C.), reversed on other grounds, 356 U. S. 576, "discloses that it is not subject to the same criticism as was directed at the House Resolution under which Watkins was questioned. It sufficiently describes 'the kind of investigation that the committee was directed to make.'"

Clause (3) of the resolution authorizes and directs the Subcommittee to make a complete and continuing study of—

> (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

It is to be noted immediately that this clause, which is the particular target of petitioner's criticism (Br. 40–41), does not include either the term "un-American" or the phrase "principle of the form of government as guaranteed by our Constitution"—whose indefiniteness this Court alluded to in *Watkins* (354

U. S. at 202). The only real point of similarity between the House resolution criticized in *Watkins* and this clause of the Senate resolution is the use in each of the word "subversive," and petitioner virtually concedes that the validity or invalidity of his challenge of the Senate resolution hinges on the single phrase "subversive activities" in this clause (Br. 41).

It is submitted, however, that the setting and context in which this phrase is used in this clause of the Senate resolution give it a more defined and specific content than the term "subversive * * * propaganda" has on the face of the House resolution. Coming as it does immediately after the reference in clause (1) to the "Internal Security Act of 1950"—the first Title of which is denominated the "Subversive Activities Control Act of 1950" (§ 1 (a), 64 Stat. 987) and which establishes a quasi-judicial agency designated as the "Subversive Activities Control Board" with important functions related to the subject matter of that Title (§ 12, 64 Stat. 997)—the term "subversive activities" in clause (3) can hardly be said to be a term utterly without defined content. To be sure, the term is qualified by the phrase "including, but not limited to"—the intended effect of which was to expand the concept of "subversive activities" somewhat beyond the confines of the specific subjects itemized following the phrase. This Court has, however, held that in congressional resolutions "[t]he meaning of the general language employed is to be confined to acts belonging to the same general class as those specifically authorized." *Reed* v. *County Commissioners*, 277 U. S. 376, 389. Applying this principle to the

third clause of Senate Resolution 366, the scope of the "subversive activities" referred to would, it would seem, be confined to activities at least of the "same general class" as "espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."[10] Since these words and phrases have been used and their meaning described in numerous federal statutes (including the detailed legislative findings concerning the world Communist movement in Section 2 of the Internal Security Act (64 Stat. 987)), and because authorizing resolutions for legislative investigations have never been considered to require the narrow, defined language of a criminal statute (see *infra*, pp. 36–37), there is no basis, we believe, for holding that the third clause of the Senate resolution renders the resolution, which is otherwise certainly specific and definite enough, vulnerable to criticism on grounds of indefiniteness.

In any event, even if it be assumed, *arguendo*, that the term "subversive activities" in the third clause of

[10] In *Watkins*, this Court referred to the expression "subversion and subversive propaganda" (as orally used by the Chairman of the Subcommittee of the Committee on Un-American Activities there involved in announcing the subject of the Subcommittee's investigation) as "at least as broad and indefinite as the authorizing resolution of the Committee, if not more so" (354 U. S. at 214). But this phrase, unlike the phrase "subversive activities" in the authorizing resolution in the case at bar, lacked a contextual setting clothing it with meaning and content.

the Senate resolution is lacking in the specificity desirable in an enabling resolution, the clarity and specificity of the entire remainder of the resolution—particularly the first two clauses—leave no real doubt, as *Sacher, supra,* 252 F. 2d at 831–832, pointed out, of the area of authority conferred by that resolution on the Internal Security Subcommittee.[11]

The strict standards of definiteness applicable to criminal statutes, it is to be remembered, have never

[11] Petitioner contends (Pet. 24) that the court below, on remand, "switched its theory of the case so as to hold the subpoena sustainable under the first two clauses of the Subcommittee's charter, whereas it had previously relied on the third clause." There is, however, no merit to this contention, which is repeated in substance in petitioner's brief (Br. 27–28). The statement assumes (1) that Judge Miller's majority opinion, when the case was initially decided, relied solely on the third clause of Senate Resolution 366 (Appendix, *infra*, p. 86) as the Subcommittee's authorization for the inquiry it was engaged in when it issued the subpoena, and (2) that Judge Prettyman's opinion, following the remand, relies solely on the first two clauses of the resolution (Br. 27–28). Neither assumption is correct.

Judge Miller's opinion cited and relied upon all three clauses of the resolution as granting authority for the inquiry (R. 103). And the mere fact that Judge Prettyman's opinion, in mentioning that the Senate Resolution here involved "is more precise than the House Resolution criticized in *Watkins*" (R. 117), refers to *Sacher* v. *United States*, 252 F. 2d 828 (C. A. D. C.) (reversed on other grounds, 356 U. S. 576) (which—see pp. 831–832—found it necessary to consider only the first two clauses of the Senate Resolution) does not warrant petitioner's supposition (see Pet. 13; Br. 27–28) that Judge Prettyman, unlike Judge Miller, intended to rely solely on the first two clauses of the resolution. There is, in short, no sufficient reason to believe that the court below, both originally and on remand, did not look to Senate Resolution 366 in its entirety as the committee's authorization for the inquiry in which it was engaged when it subpoenaed the records here in issue.

been thought applicable to resolutions establishing congressional committees and defining their powers. The demarcation of the areas of authority of such committees is in the nature of things required to be stated in the most general of terms. If the resolution establishing the Senate Committee on Internal Security Committee is, as petitioner urges (Br. 41), fatally indefinite because of its employment of the phrase "subversive activities," then so, it would seem, are the authorizing resolutions—cast as they are in equally if not more indefinite terms—of the Committees on the Armed Services, Interstate and Foreign Commerce, and Appropriations, as well as the resolutions creating numerous select and special committees which have been established by Congress from time to time. See the dissenting opinion of Mr. Justice Clark in *Watkins*, 354 U. S. at 220–222. "Yet no one," as Mr. Justice Clark noted, "has suggested that the powers granted [these other committees] were too broad" (*id.*, p. 222).

II. The Subcommittee's investigation of petitioner's union, with a view to ascertaining the extent to which it had been infiltrated by members of the Communist Party, had a valid legislative purpose

Petitioner contends that the Subcommittee's investigation was not shown to be pursuant to a valid legislative purpose but was an unwarranted intrusion into the privacy of the union members—a contention which none of the judges of the court below accepted. We recognize that the power of Congress to conduct investigations, which "is inherent in the legislative process", is "broad" but "not unlimited" (*Watkins*, 354

U. S. at 187), and submit that the inquiry here conducted was well within that power.[12]

1. Because of the great importance of Congress' thoroughly informing itself before enacting legislation, this Court has upheld the power of Congress to conduct investigations pursuant to a valid legislative purpose, even though the investigation may relate to the private or personal affairs of the witness under interrogation. *Sinclair* v. *United States*, 279 U. S. 263, 294. In addition, this Court has firmly established the presumption that committees of Congress, as a coordinate body of the Federal Government, are acting pursuant to such a valid legislative purpose when conducting investigations within the range of their constitutional powers. *In re Chapman*, 166 U. S. 661, 669–671; *McGrain* v. *Daugherty*, 273 U. S. 135, 178; *Sinclair* v. *United States*, *supra*, 279 U. S. at 295.[13] See also Fleischmann, *Watkins* v. *United States*

[12] Petitioner states that "[i]n *Watkins*, the Court set aside for lack of a legislative purpose an attempted invasion of the privacy of a few former members of the Communist Party, whom the witness had refused to name" (Br. 22). This, however, is a misstatement of the *Watkins* holding. The holding of that case was, not that there was no valid legislative purpose, but that the committee had erroneously failed to apprise the witness, upon the latter's objection on grounds of pertinency, "what the topic under inquiry" was (this not having been "made to appear with undisputable clarity") and "the connective reasoning whereby the precise questions asked relate[d] to it" (354 U. S. at 208–215). See *infra*, pp. 69–71.

[13] To the extent that *Kilbourn* v. *Thompson*, 103 U. S. 168, is inconsistent with these later cases, its authority has been eroded by the latter. See *United States* v. *Rumely*, 345 U. S. 41, 46, and the criticisms of *Kilbourn* v. *Thompson* therein cited. In *Watkins* v. *United States*, 354 U. S. 178, the *Kilbourn* case was cited merely for its historical value (*id.*, at 194) and for the

and Congressional Power of Investigation, 9 Hastings L. J. 145, 149–150 (1958). On the basis of these cases, the lower federal courts have summarized the present posture of the law in the following terms: "[W]hen the general subject of investigation is one concerning which Congress can legislate, and when the information sought might aid the congressional consideration, a legitimate legislative purpose must be presumed." *United States* v. *Orman,* 207 F. 2d 148, 157 (C. A. 3). Accord, *Townsend* v. *United States,* 95 F. 2d 352, 361 (C. A. D. C.), certiorari denied, 303 U. S. 664; *Morford* v. *United States,* 176 F. 2d 54, 58 (C. A. D. C.), reversed on other grounds, 339 U. S. 258; *United States* v. *Kamin,* 136 F. Supp. 791, 803 (D. Mass.).

These principles were not overturned but on the contrary were substantially reaffirmed by this Court in *Watkins* v. *United States,* 354 U. S. 178. There, the Court restated the generally accepted principles that an investigation cannot be "an end in itself" without any relation to "a legitimate task of the Congress" (*id.,* at 187) and that "there is no congressional power to expose for the sake of exposure" (*id.,* at 200). Nonetheless, this Court indicated that congressional committees could sometimes inquire into private matters, noting only two exceptions: first, the situation discussed in *Kilbourn* v. *Thompson, supra,* 103 U. S. 168, which "teaches that such an investigation into individual affairs is invalid if unrelated to *any* legislative purpose" (emphasis added), and second, that

unexceptionable proposition that "an investigation into individual affairs is invalid if unrelated to any legislative purpose" (*id.,* at 198).

of *United States* v. *Rumely*, 345 U. S. 41, which "makes it plain that the *mere semblance* of legislative purpose would not justify an inquiry in the face of the Bill of Rights" (354 U. S. at 198; emphasis added). It was on the basis of these two exceptions that this Court said, of the presumption of a valid legislative purpose (*ibid.*):

> The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected.

2. Applying these standards to the facts in the instant case, the Government contends that the public need overwhelmingly overbalanced the private rights allegedly affected. The only private interest which petitioner asserts is "that labor unions should not be required to divulge the names of their members" (Pet. 17; Br. 22) and his completely unsubstantiated suggestion that the list would be used for "blacklisting" (Pet. 25; Br. 20).[14] Valuable as may be the interest

[14] In *Morford* v. *United States*, *supra*, 176 F. 2d at 58, the appellant claimed more clearly than in the present case that the committee's request for disclosure of the names of participants in and contributors to the National Council of American-Soviet Friendship was for the purpose of adding the names to the committee's "blacklist" and destroying the organization's effectiveness. The claim was rejected on the ground that "a legitimate legislative purpose is presumed * * *" (*ibid.*). Other attempts to impugn the motives of members of committees have also been rejected for the same reason. *E.g.*, *Eisler* v. *United States*, 170 F. 2d 273, 278–279 (C. A. D. C.), certiorari dismissed, 338 U. S. 883. And in *Watkins*, this Court stated (354 U. S. at 200):

of a union in keeping secret the names of its members, it certainly does not, by itself, rise to the stature of the First Amendment right considered in *United States* v. *Rumely*, 345 U. S. 41. On the other hand, the public interest here goes far beyond the "mere semblance of legislative purpose" which this Court found present in *Rumely*.

Before petitioner was subpoenaed, the Subcommittee, as we have seen (*supra*, pp. 8–9), had information that the UPWA, of which petitioner was the National President, was an organization of between 35,000 and 50,000 members who were employed in "various governmental agencies" throughout the country, including the Federal Government; that the chief national officer of this union—petitioner—was not only a member of the Communist Party but a "tried fanatic," or "hard core member," of that Party; that Ewart Guinier, the union's secretary-treasurer and co-leader with petitioner at the national level, was also a Communist Party member; that a man who had in the recent past been the union's negotiations director was likewise a Communist Party member, as were also "certain of the members of the executive board." In short, the Subcommittee had information that petitioner's union, substantial numbers of whose members were then in the employ of the Federal Gov-

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"We have no doubt that there is no congressional power to expose for the sake of exposure. * * * But a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served [footnote reference omitted]."

ernment, was penetrated at the top by members of the Communist Party and that its highest leader—petitioner himself—was a "hard core member" of the Party.

If the committee's information was correct—and it was fully corroborated by many witnesses—it is evident that the UPWA was, or very possibly was, a "Communist-front organization" as defined by the Internal Security Act of 1950[15]—the administration, operation, and enforcement of which, by the express terms of the committee's charter, was its peculiar concern. It is also evident that, if the committee's information was correct, there were grounds for investigating whether substantial numbers of the union's then-current members were members of the Communist Party. And since many of the members of the union were at that time employees of the Federal Government, the committee manifestly had cause to inquire into the possibility that members of the union who were also members of the Communist Party were then in the employ of the Federal Government.

Petitioner's own testimony before the committee, moreover, significantly corroborated the committee's information regarding the substantiality of the number of the members of petitioner's union who were in

[15] Section 3 (4) of that Act (50 U. S. C. 782 (4)) defines a "Communist-front organization" as "any organization in the United States" other than a "Communist-action organization" which is "substantially directed, dominated, or controlled by a Communist-action organization" and is "primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement." For the definition of a "Communist-action organization," see Section 3 (3) (50 U. S. C. 782 (3)).

the employ of the Federal Government. He testified, as we have seen (*supra*, p. 12), that there were "about 35,000" members in his union, and that "about 5 percent" of these were Federal employees, the remaining 95 percent being in the employ of state, county, and municipal governments (R. 43). In other words, according to petitioner's own testimony, in the neighborhood of 1,750 persons, who were members of what the committee had reasonable grounds to believe from other sources had been deeply penetrated by and might well have been a "front" of the Communist Party, were currently in the employ of the Federal Government, with the remaining 33,000-odd being in the employ of state and local governments throughout the country.

In these circumstances, it is submitted, the action of the committee in subpoenaing the financial and membership records of this union was a reasonable and logical step in its investigative process in aid of its function of keeping the Congress informed in the field of its special jurisdiction and recommending appropriate remedial legislation where such seemed necessary.

3. That Congress had a keen and continuing interest at the time here relevant (October 1951) in informing itself with respect to whether members of the Communist Party held positions of trust and influence in the Federal Government and in the enactment of legislation dealing with such employment is, we take it, not subject to doubt. As long ago as 1939, Congress, in the Hatch Act, in a provision obviously aimed at members of the Communist Party among others, had

made it unlawful for any person employed in any capacity by any agency of the Federal Government to have membership in any political party or organization which advocates the overthrow of the constitutional form of government presently existing in the United States (Act of August 2, 1939, c. 410, § 9A, 53 Stat. 1148; 5 U. S. C. 118j). The Internal Security Act had been on the books for slightly over a year (Act of September 23, 1950, c. 1024, 64 Stat. 987, 50 U. S. C. 781 *ff.*). This Act contained a formal declaration by Congress that "[t]here exists a world Communist movement" consisting of a "world-wide revolutionary movement whose purpose it is, by treachery, deceit, *infiltration into other groups (governmental and otherwise)*, espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization" (§ 2 (1); 50 U. S. C. 781 (1); emphasis added). Declaring that the "Communist organization in the United States" presented "a clear and present danger to the security of the United States and to the existence of free American institutions" (§ 2 (15); 50 U. S. C. 781 (15)), it provided for proceedings before a Subversive Activities Control Board, which was to have the power, after the holding of hearings and the adduction of evidence, to order any organization found to be a "Communist-action" or "Communist-front" organization to register as such with the Attorney General (§ 13; 50 U. S. C. 792). When such an order had become final as de-

fined in the Act, after full opportunity for judicial review (§ 14; 50 U. S. C. 793), it became criminally punishable for any member of such organization, having knowledge or notice of the existence of such final order, to conceal or fail to disclose his membership in seeking, accepting, or holding any nonelective federal employment, or to hold such employment (§§ 5 (a) (1), 15 (c); 50 U. S. C. 784 (a) (1), 794 (c)). As we have seen, one of the principal functions and responsibilities of the Subcommittee—whence, indeed, it derives its name—was, under its charter, the making of a "complete and continuing study and investigation" of "the administration, operation, and enforcement of" this Act (S. Res. 366, 81st Cong., 2d sess.; Appendix, *infra*, p. 86).

4. That Congress, through its appropriate committees, has the *power* to inquire into the subjects of communism and the Communist Party as an adjunct to its power to legislate with respect thereto, is equally undeniable. See, *e. g.*, *American Communications Assn.* v. *Douds*, 339 U. S. 382; *Osman* v. *Douds*, 339 U. S. 846; *Galvan* v. *Press*, 347 U. S. 522; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Carlson* v. *Landon*, 342 U. S. 524; *Adler* v. *Board of Education*, 342 U. S. 485; *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531 (C. A. D. C.), reversed on other grounds, 351 U. S. 115; cf. *Dennis* v. *United States*, 341 U. S. 494. It is likewise clear that the mere possibility that unconstitutional legislation will eventuate from an otherwise legitimate congressional inquiry cannot invalidate the inquiry itself. *Barsky*

v. *United States*, 167 F. 2d 241, 245 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Josephson*, 165 F. 2d 82, 91–92 (C. A. 2), certiorari denied, 333 U. S. 838.[16] Since Congress unquestionably has this power, the lower federal courts have repeatedly upheld congressional inquiries into Communist leadership in and infiltration of organizations and industries far less intimately connected with the Federal Government and the nation's security than the United Public Workers appeared to have been at the time here in issue on the basis of the information in the possession of the committee. *United States* v. *Lattimore*, 215 F. 2d 847, 851 (C. A. D. C.); *Marshall* v. *United States*, 176 F. 2d 473, 474 (C. A. D. C.), certiorari denied, 339 U. S. 933; *Lawson* v. *United States*, 176 F. 2d 49, 53 (C. A. D. C.), certiorari denied, 339 U. S. 934; *Morford* v. *United States*, *supra*, 176 F. 2d at 57; *Barsky* v. *United States*, *supra*, 167 F. 2d at 246; *United States* v. *Josephson*, *supra*, 165 F. 2d at 89–90; *United States* v. *Kamin*, *supra*, 136 F. Supp. at 801; *United States* v. *Bryan*, 72 F. Supp. 58, 62 (D. D. C.), reversed on other grounds, 174 F. 2d 525 (C. A. D. C.), reversed, 339 U. S. 323.

Nor does the fact that the inquiry goes into the question of names of individuals invalidate it. "If Congress has power to inquire into the subjects of Communism and the Communist Party," as was aptly observed in the *Barsky* case, *supra*, 167 F. 2d at 246—

[16] "Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry; invalid legislation might ensue from any inquiry" (*Barsky*, 167 F. 2d at 245).

> it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. *Personnel is part of the subject.* [Emphasis added.] [17]

Or, as the court below in its original opinion in the instant case put it, "the names of members were pertinent because an investigation of the union was pertinent" (R. 104).

It is manifest that Communist leadership in and infiltration of a union having among its members a substantial number of Federal employees would be a matter of far graver concern to the Congress than mere inefficiency or even malfeasance in the administration of the affairs of the Federal Government—a matter with which Congress has always had a deep and abiding concern, the legitimacy of which has never been questioned. See *Watkins* v. *United States, supra,* 354 U. S. at 200, n. 33; *McGrain* v. *Daugherty, supra,* 273 U. S. at 177–178; Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 Harv. L. Rev. 153, 194 (1926); cf. *Sinclair* v. *United States, supra,* 279 U. S. at 294, 297. As this Court noted in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 388–389 (upholding the valid-

[17] Quoted with approval in *Barenblatt* v. *United States,* 240 F. 2d 875, 884 (C. A. D. C.), reversed and remanded on other grounds, 354 U. S. 930. The subsequent reaffirmance of Barenblatt's conviction is pending on certiorari as No. 35, this Term. Our brief in No. 35 contains a further discussion of congressional investigations into communism and the Communist Party—to which the Court is respectfully referred.

ity of the non-Communist oath provision (§ 9 (h)) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U. S. C. 159 (h)):

> Substantial amounts of evidence were presented to various committees of Congress * * * that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. And other evidence supports the view that some union leaders who hold to a belief in violent overthrow of the Government for reasons other than loyalty to the Communist Party likewise regard strikes and other forms of direct action designed to serve ultimate revolutionary goals as the primary objectives of labor unions which they control. * * * It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives * * * but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action.

Since the Subcommittee, before subpoenaing petitioner, had convincing information tending to indicate complete Communist Party domination and control of the union of which he was president (see *supra*, pp. 8–9), it could reasonably have concluded that the Communist leadership might some day attempt to use the

union for its own ends—whether for a "political strike" or some other form of "direct action designed to serve ultimate revolutionary goals" (*Douds, supra,* at 388). And because the National Labor Relations Act—and therefore its non-Communist affidavit clause (see R. 44–45)—does not apply to a union representing Federal and state employees (29 U. S. C. 152 (2), (3), and (5)), the Subcommittee could well have considered that additional legislation might be needed with respect to Communist domination of this union. At the very least, Congress, through its appropriate committees, of which this Subcommittee was certainly one, had the authority to examine into the situation by a thorough investigation.

Both the authorizing resolution and subsequent history of the Subcommittee, moreover, strongly support the Government's contention that the investigation here was being conducted pursuant to a valid legislative purpose. The first two clauses of the resolution, discussed *supra,* pp. 32–33, show clearly that the Subcommittee was created for the primary purpose of studying and investigating "the administration, operation, and enforcement of" the "Internal Security Act of 1950" and "other laws relating to espionage, sabotage, and the protection of the internal security of the United States" (Appendix, *infra,* p. 86). While such a clear statement of legislative purpose is not required (*In re Chapman,* 166 U. S. 661, 669–670; *McGrain* v. *Daugherty,* 273 U. S. 135, 177–178), it supports and fortifies the presumption that the Subcommittee was pursuing such a purpose.

Similarly, it is, of course, not essential to show that legislation has actually been recommended by a committee to prove that it has been pursuing a valid legislative purpose. *United States* v. *Josephson, supra,* 165 F. 2d at 89–90; *Townsend* v. *United States, supra,* 95 F. 2d at 355. The committee might well find, as a result of its investigation, that no legislation is required or even that existing legislation is unnecessary. See Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 Harv. L. Rev. 153, 208–209, 217–218 (1926). On the other hand, the fact that legislation was proposed as a result of the investigation goes far toward establishing a valid legislative purpose. See *Barsky* v. *United States, supra,* 167 F. 2d at 245.. As a direct result of the 1951 investigations of labor unions, including that of the UPWA, the Internal Security Subcommittee recommended and Congress ultimately passed the Communist Control Act of 1954, c. 886, 68 Stat. 775. See S. Rept. No. 1709, 83d Cong., 2d sess., p. 2; Annual Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Committee on the Judiciary, United States Senate, 83d Cong., 2d sess., for the Year 1954, pp. 2–4.[18] This Act amended the

[18] Another proposed statute which was recommended in 1954 by the Subcommittee and the full Judiciary Committee as a result of the labor union investigations would have allowed an employer to discharge an employee who is a member of a subversive organization without being held accountable for an unfair labor practice. See the Subcommittee's 1954 Annual Report (cited in text above), p. 3. Each of the Subcommittee's annual reports indicates that the Subcommittee does not "expose for

Internal Security Act of 1950 so as to deny to any labor organization found by the Subversive Activities Control Board to be either a Communist-action organization, a Communist-front organization, or a "Communist-infiltrated" organization (as therein defined) all rights, privileges, and benefits which it might otherwise enjoy under the National Labor Relations Act. See 50 U. S. C. (Supp. V) 792a (h)."[19] (The fact that the U. P. W. A. is not covered by the National Labor Relations Act [see p. 49, *supra*] does not detract from the fact that the Subcommittee's inquiry into labor unions generally had a valid legislative purpose.)

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the sake of exposure" but rather investigates pursuant to its constant consideration of proposed legislation. See, *e. g.*, its Annual Report to the Committee on the Judiciary, 85th Cong., 1st sess., for the Year 1957, pp. 16–18.

[19] The definition of a "Communist-infiltrated" organization is set forth in Section 3 (4A) of the Internal Security Act as amended by the Communist Control Act (50 U. S. C. (Supp. V) 782 (4A)). A proviso in the definition states that "any labor organization which is an affiliate in good standing of a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement, shall be presumed prima facie not to be a 'Communist-infiltrated organization' ". The UPWA, it is significant to note, was expelled from the C. I. O. in 1950 following a finding by that body that it was Communist-dominated (Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong., 1st sess., on *Subversive Control of the United Public Workers of America*, Part I, July 27, August 9, 23, 25 and 29, September 28, October 5 and 10, December 14, 1951, pp. 27–28).

III. The membership lists in fact were pertinent to the inquiry

1. The names of the members of petitioner's union, which the subpoena called for, were clearly pertinent to the subject of the Subcommittee's inquiry—the extent of the Communist Party's infiltration into the union. As observed in the Court of Appeals' initial opinion (R. 104):

> The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union even though the names of state and local members are included. Regardless of where they were employed, the names of members were pertinent because an investigation of the union was pertinent.

Petitioner criticizes this reasoning by saying that there is "no evidence" that the subject of the inquiry was Communist infiltration of the union, or that the purpose of the demand was to check the names of union members against a "master list of 'subversives'," or that the committee had such a list (Br. 29).

That the subject of the inquiry was Communist infiltration of the union, however, is manifest from the entire tenor of the questions which the Subcommittee asked petitioner (*supra*, pp. 12–15), particularly when viewed in the light of the background information concerning petitioner and his union which the committee had received prior to subpoenaing him (*supra*, pp. 8–9). The subject matter of the inquiry in fact appeared with undisputable clarity, and, as we shall

show more fully below (Point V, *infra*, pp. 68–75), was known to petitioner, who made no objection on grounds of pertinency.

It is unimportant that Senator Watkins did not formally state for the record that it was the committee's purpose to use the list of members as a check list in its investigation into the extent of Communist infiltration of the union, since he was never asked by petitioner to elucidate the committee's purpose in demanding the list—doubtless because petitioner understood the purpose very well.[20] It is sufficient if, as the court below indicated, this could reasonably have been the committee's purpose. Nor was it necessary for the committee to have had a "master list of 'subversives' " for the union membership list to have been useful to the committee in its inquiry. The court below said nothing about any such "master list." The term is petitioner's (Br. 29, 31). But the committee certainly had in its files, as a result of its prior investigations, names of persons who, there were at least grounds for believing, were members of the Communist Party. A reasonable step in the committee's inquiry into the extent of Communist penetration of the UPWA was to check against those names the

[20] Petitioner's assumption (Br. 20, 35–36) that Senator Watkins, by not formally and in so many words repudiating petitioner's charge that the purpose in subpoenaing the membership records was to use them as "blacklists," acknowledged that this was their purpose is manifestly unwarranted, and is refuted, furthermore, by the entire tenor of the Senator's statements during the course of petitioner's testimony (see, in particular, R. 48–49).

names of the members of the union.[21] The court below obviously meant no more than this, and petitioner's attempt to distort that meaning does not detract from the sensibleness of the procedure suggested.

That such a step in the investigatory process would be reasonable, particularly in view of the abundance of the evidence of the union's Communist leadership, finds support in the decisions of the courts as well as in logic. See, *e. g., United States* v. *Orman, supra,* 207 F. 2d at 154–155; *Townsend* v. *United States, supra,* 95 F. 2d at 361; *United States* v. *Deutch,* 147 F. Supp. 89, 92 (D. D. C.); *United States* v. *Bryan, supra,* 72 F. Supp. at 61.

The results of the committee's inquiry into the names of the members of the union in order to ascertain the extent of Communist infiltration would certainly bear directly on the kind of remedial legislation, if any, which the committee would ultimately propose. For example, if it appeared that the overwhelming majority of the union's members were non-Party members, remedial legislation designed to oust the Communists from positions of control might take the form of measures aimed primarily at improving intra-union democracy; if the situation proved to be otherwise, the legislation might require a different cast, as for example the imposition of special penalties or

[21] The mere recital of the number of persons involved would not, contrary to Judge Edgerton's suggestion (R. 113), have satisfied this purpose. Nor would it have enabled the Subcommittee to determine the importance and sensitivity of the government positions held by members of the UPWA.

disabilities on Communist-dominated and infiltrated unions in general.

2. Petitioner contends (Br. 23–26) that "the invalidity of the subpoena is aggravated by the demand for the names of state, county and municipal employees" (Br. 23). "In this case," it is argued, "the Subcommittee asserted power to inquire into the organizational affiliations of state and local government employees. This was not a field within which Congress could legislate, being within the reserved powers of the states, and therefore the inquiry was ultra vires" (Br. 24). The contention, we submit, is unsound.

The same considerations which warranted the committee in inquiring into whether Federal-employee members of petitioner's union were members of the Communist Party—*viz.*, its concern over the possibility of there still being Communists in the Federal Government and the threat to the nation's security which would thereby be posed—also justified it in inquiring into whether the state- and municipal-employee members of the union were Party members. Article IV, Section 4, of the Constitution requires that the United States guarantee to every State a republican form of government. This clause is for Congress to enforce. *Luther* v. *Borden*, 7 How. 1, 42–43; *Ohio* v. *Akron Park District*, 281 U. S. 74, 79–80. "This clause alone," as was observed in the *Barsky* case, *supra*, 167 F. 2d at 246, "would supply the authority for Congressional inquiry into potential threats to the republican forms of the governments of the States." And see *United States* v. *Josephson*,

supra, 165 F. 2d at 90. The Internal Security Act, moreover—the administration and enforcement of which, as we have seen, is the peculiar concern of this Subcommittee under its charter—in the introductory section referring to the need for the legislation, specifically cites (among other considerations) Congress' responsibility under this clause for "guarantee[ing] to each State a republican form of government" (§ 2 (15); 50 U. S. C. 781 (15)). And in *Pennsylvania* v. *Nelson,* 350 U. S. 497, 505, this Court, specifically noting this and kindred provisions of the Internal Security Act, observed that "Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem," and referred to the fact that Congress had "proscribed sedition against all government in the nation—national, state and local."

In the *Nelson* case this Court invalidated a state sedition statute—and in effect all such statutes—on the ground that Congress, by the Smith Act, had preempted the field. Since congressional legislation protecting state governments as well as the Federal Government from subversion and sedition is valid, it would follow *a fortiori* that Congress, through its appropriate committees, may conduct investigations in aid of legislation in this field.[22]

[22] Some federal courts have held that Congress may investigate matters exclusively within the jurisdiction of the states, provided the matters affect powers granted to the Federal government. *United States* v. *DiCarlo,* 102 F. Supp. 597, 602 (N. D. Ohio); *United States* v. *Bryan,* 72 F. Supp. 58, 61 (D. D. C.), reversed on other grounds, 174 F. 2d 525 (C. A. D. C.), reversed, 339 U. S. 323. And the courts, as we have seen,

3. *National Assn. for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, relied on by petitioner (Br. 30), presents only surface similarities to the case at bar. In substance it is clearly distinguishable. In that case this Court set aside a contempt judgment entered in an Alabama court against the N. A. A. C. P. for refusing to obey a production order compelling disclosure of its Alabama membership lists. This Court, pointing out that the N. A. A. C. P. was an association of individuals who had banded together to advocate, as it was their constitutional right to do, public and private controversial points of view and to foster common beliefs, held that it was an infringement of the Fourteenth Amendment for Alabama, by State action, to invade the privacy of the members' association by compelling public disclosure of the group's members, *in the absence of a showing of an overriding and proportionate public need for the disclosure*. It was the complete absence of such a showing on which the decision turned (see 357 U. S. at 463–466), and it is this factor which makes that case clearly distinguishable from this.

The Court emphasized in the *N. A. A. C. P.* case that "compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate" (at pp. 462–463). The Court then considered whether Alabama had "demonstrated

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supra, pp. 45–46, have refused to presume, merely because an investigation might conceivably result in unconstitutional legislation, that the investigation itself is void from the outset.

an interest in obtaining the disclosures * * * which is sufficient to justify the deterrent effect * * * on the free exercise by petitioner's members of their constitutionally protected right of association" (p. 463). It concluded that the State's purported justification—that the membership lists were necessary to ascertain whether the N. A. A. C. P. came within the scope of the State registration statute applying to intrastate business—was not "sufficient to overcome petitioner's constitutional objections" (p. 465), particularly in view of the Association's admitted presence in the State. Indeed, the Court said it was "unable to perceive that the disclosure of the names of [the Association's] rank-and-file members has a substantial bearing on" the issue (p. 464).

In contrast, for the reasons which we have previously set forth, the public interest of the Congress, acting through this Subcommittee, in obtaining the names of the members of petitioner's union outweighed their interest in preserving their anonymity and the privacy of their association. Cf. *United States* v. *Harriss*, 347 U. S. 612, 625–626. The *N. A. A. C. P.* case, therefore, gives no support to petitioner's position.[23]

* * * * *

Having demonstrated (Points I–III, *supra*) that the Subcommittee had been validly empowered to compel

[23] Two prior decisions of the court below have likewise upheld demands for the disclosure of the names of personnel of organizations under investigation. *Marshall* v. *United States*, *supra*, 176 F. 2d at 474; *Morford* v. *United States*, *supra*, 176 F. 2d at 57–58.

disclosure of the membership lists, we next consider whether the procedures followed at the Subcommittee hearing itself accorded petitioner all the protection to which he was entitled (Points IV–VI), noting the significant fact that petitioner, who failed to bring the lists with him to the hearing as required by the subpoena, had obviously determined in advance not to comply regardless of what took place at the hearing (Point VII).

* * * * *

IV. The Subcommittee acted with a duly authorized quorum, since Senator Watkins' admitted power to conduct the hearing and take petitioner's testimony necessarily included the power to rule upon petitioner's objections to production

When this case was decided originally by the court below, the fact that it was a "one-member" committee which heard and overruled petitioner's objection to the production of the subpoenaed records formed the sole basis of Judge Fahy's dissent. He dissented, he said, "on the ground that the Subcommittee had empowered a single member only to administer oaths and to take sworn testimony and this power was not broad enough to include authority in but one member to rule upon objections to the production of documents called for by a subpoena *duces tecum*" (R. 114)[24] On remand of the case for consideration in the light of *Watkins*, Judge Fahy, joined by Judges Edgerton and Bazelon, adhered to his prior view, which he thus explained (R. 119):

[24] Judges Edgerton and Bazelon were also of this view (see their separate dissenting opinion at R. 113). In addition, they dissented on a separate ground, which forms the subject of Point VI (*infra*, pp. 76–80).

> There [in *Watkins*] the Court was considering the question of the committee's authorized scope of inquiry as it bore upon the pertinency of questions asked a witness. But the force of *Watkins* cannot be confined to issues of pertinency. *Watkins* requires as well clarity and certainty in the delegation of whatever power is sought to be exercised to compel obedience by a witness on pain of punishment for crime for not obeying. In that light *Watkins* fortifies the basis of my previous dissent. The charter here was the resolution of the parent Subcommittee delegating specified authority to a one-member subcommittee. To repeat, this subcommittee, before whom appellant appeared, was given authority only to administer oaths and to take sworn testimony. Its charter is expressed only in those terms. The broader authority claimed is not to be implied. * * *

Petitioner adopts this argument of Judge Fahy's (Pet. 29; Br. 43–47).

Shortly following the creation of the Senate Internal Security Subcommittee, the Subcommittee—pursuant to the authority conferred by Section 2 of Senate Resolution 366 (Appendix, *infra*, pp. 86–87) and subsection 3 (b) of Rule XXV of the Standing Rules of the Senate, as amended (Appendix, *infra*, p. 87)—adopted a resolution to the effect that a single member would constitute a quorum for the purpose of taking testimony at hearings.

1. Senator Watkins, on the day in question, was not, therefore, as Judge Fahy assumes, a one-member subcommittee of the Internal Security Subcommittee. He was, for the purpose of conducting the hearing

and taking testimony, a one-man quorum of the Internal Security Subcommittee itself. Therefore it is inaccurate to refer to Senator Watkins' "charter" as a "one-member subcommittee" of the "parent Subcommittee [on Internal Security]." To repeat, Senator Watkins constituted a special-purpose quorum of the Internal Security Subcommittee itself. For that purpose, he "comprise[d] the subcommittee that day" (R. 37) and petitioner does not question Senator Watkins' authority to conduct that day's hearing and take petitioner's testimony. Cf. *Christoffel* v. *United States,* 338 U. S. 84, 88–89; *Watkins* v. *United States,* 354 U. S. 178, 200–201, 205.

The problem, therefore, is not one of ascertaining the scope of a "charter" of a "one-member subcommittee" of a Subcommittee. It is simply to give a sensible meaning to a committee resolution providing that a single member of the committee will constitute a quorum for a specific purpose, *viz.,* "for the purpose of taking sworn testimony" (Rule XXV (3) (b) of the Standing Rules of the Senate, as amended by S. Res. 180, 81st Cong., 2d sess.; Appendix, *infra,* p. 87).

2. The legislative history of Senate Resolution 180, 81st Cong., 2d sess.—which amended Senate Standing Rule XXV (3) by adding a second paragraph, (b), providing that each standing committee and each subcommittee of any such committee is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony (see Appendix, *infra,* p. 87)—supports our interpretation of the meaning of the paragraph. The committee report on

the resolution (S. Rept. No. 1208, 81st Cong., 2d sess.), after stating that it was occasioned by this Court's decision in the *Christoffel* case[28] and was intended to be "an adequate response to" that decision, points out that "[i]n the future a quorum of Senate standing committees and subcommittees *for hearings* will be fixed and made absolute" and that "this resolution, in addition to meeting the objections raised by the Christoffel decision, will facilitate the maintenance of committee quorums at *hearings*" (pp. 2, 3; emphasis added). Similarly, in explaining the resolution to the Senate, Senator Hayden, the Chairman of the Committee on Rules and Administration, which reported the resolution, said that it would allow "any committee" to "determine the size of the committee at *a hearing* * * *" (96 Cong. Rec. 1284; emphasis added). These statements make it clear, we believe, that the purpose of the provision was to amend the rule as it applies to *hearings* in general and that the words "taking sworn testimony" were not to be narrowly or restrictively construed.

Reasonably construed, and in the light of this legislative history, the power which was lodged in Senator Watkins as a one-member quorum of the Subcommittee to "tak[e] sworn testimony" clearly included the power to receive subpoenaed documents as a power incidental and normally ancillary to the taking of

[28] *Christoffel* v. *United States*, 338 U. S. 84 (holding that it was incumbent on the Government, in a prosecution for perjury before a congressional committee, to establish as part of its affirmative case that a quorum of the committee was present at the time of the giving of the allegedly perjurious testimony).

testimony. "[T]o give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions" (8 Wigmore, *Evidence* (3d ed. 1940), § 2193). Similarly, the Eighth Circuit has held (*Brownson* v. *United States*, 32 F. 2d 844, 846–847), in interpreting a statute requiring persons "to give testimony or answer interrogatories," that:

> This testimonial duty to attend and disclose applies equally to the production of documents; and the process for documents will be implied wherever testimonial compulsion in general is predicated by a statute.

While law dictionaries have defined "testimony" so as to exclude written documents (see Pet. Br. 45), a large number of cases have held that this definition is a highly technical one, not in accord with normal usage.[26] And this Court has repeatedly said that "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and

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[26] See *e. g.*, *Crumley* v. *State*, 18 Ala. App. 105, 106, 89 So. 847, 848 (1921); *Mann* v. *Higgins*, 83 Cal. 66, 69, 23 Pac. 206, 207 (1890); *Talley* v. *State*, 160 Fla. 593, 600, 36 So. 2d 201, 205 (1948); *Hargrove* v. *State*, 117 Ga. 706, 707–708, 45 S. E. 58 (1903); *Donham* v. *Joyce*, 257 Ill. 112, 122, 100 N. E. 524, 527 (1912); *Welch* v. *Miller*, 32 Ill. App. 110, 112 (1889); *Jones* v. *Gregory*, 48 Ill. App. 228, 230 (1892); *Seaverns* v. *Lischinski*, 82 Ill. App. 298, 304 (1898); *In re Burcham's Estate*, 211 Iowa 1395, 1399, 235 N. W. 764, 766 (1931); *State* v. *Winney*, 21 N. D. 72, 74–75, 128 N. W. 680, 681 (1910); *Grayson* v. *Durant*, 43 Okla. 799, 804, 144 Pac. 592, 595 (1914); *Dial* v. *Gardner*, 104 S. C. 456, 461, 89 S. E. 396, 397 (1916); *Superior Lloyds of America* v. *Foxworth*, 178 S. W. 2d 724, 726 (Tex. Civ. App., 1944); *United States* v. *Clark*, 5 Utah 226, 231, 14 Pac. 288, 291 (1887); *Jones* v. *City of Seattle*, 51 Wash. 245, 248–249, 98 Pac. 743, 745 (1908); *Wyuta Cattle Co.* v. *Connell*, 43 Wyo. 135, 143–144, 299 Pac. 279, 281 (1931).

usual sense, and with the meaning commonly attributed to them." *Caminetti* v. *United States*, 242 U. S. 470, 485–486. See also, *e. g.*, *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560; *Crane* v. *Commissioner*, 331 U. S. 1, 6; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U. S. 264, 268–269. There is clearly no reason for applying a different rule in construing congressional resolutions.

But if Senator Watkins' power as a one-member quorum to "tak[e] sworn testimony" included as a normal incident thereto the power to receive subpoenaed documents (as it clearly did, for the reasons and under the authorities above set forth), it also included the authority to entertain and pass upon objections to the production of subpoenaed documents, for the same reason that it surely included the power to entertain and pass upon objections to the requiring of oral testimony.

Judge Fahy, it is to be noted, does not suggest in the above-quoted (p. 60) passage of his opinion that a single Senator or Congressman in whom there had been lodged the authority to take sworn testimony would lack the power—normally incident to that authority—to pass upon a witness' objections to propounded questions. *Watkins* itself would seem to recognize that in such a situation the single Senator or Congressman would possess this power: "To carry out this mission [*i. e.*, of obtaining facts upon which the full legislature can act], committees and subcommittees, *sometimes one Congressman*, are endowed with the *full power* of the Congress to compel testimony" (354 U. S. at 200–201, emphasis added).

Indeed, it cannot be supposed that it was the intent of the Senate, in authorizing one-man committee quorums for the purpose of taking sworn testimony, to require, if a witness objected to a question, that the committee member conducting the hearing adjourn the hearing, summon the full committee (or a regular quorum thereof) to pass upon the objection, and then resume the hearing—only to have to repeat the process each time the witness objected to a question. Obviously it was the Senatorial intent to permit the one-member quorum to pass upon objections to questions himself, as an incident of his power to conduct the hearing. For, "[t]he power to take testimony necessarily implies the requisite authority to compel a witness to answer pertinent questions" (*United States* v. *Aiuppa*, 102 F. Supp. 609, 611 (N. D. Ohio), reversed on other grounds, 201 F. 2d 287 (C. A. 6)[27]). But, by the same token, if to receive subpoenaed documents is a normal incident of the taking of testimony (as we have argued it is), the one-member quorum possesses also the authority, as an incident of his general power to conduct the hearing and take sworn testimony, to entertain and pass upon objections to the production of such documents. The self-same considerations apply to either situation.

3. If, however, contrary to the contention advanced above, it was the intent of the Senate to have the full Subcommittee pass upon such objections, petitioner

[27] This decision rejected a contention that "a subcommittee of one"—which was concededly authorized to "take testimony"—was "without authority to direct the witness to answer the questions" (102 F. Supp. at 611).

failed properly to raise the issue of the absence of a quorum to rule upon his objections, with the consequence—see *United States* v. *Bryan*, 339 U. S. 323, 332–334—that the point was waived and was not available to petitioner at his trial (cf. *United States* v. *Fleischman*, 339 U. S. 349, 352).

While petitioner raised a point of "no quorum" at the outset of his appearance before the Subcommittee (R. 38–39), he made no distinction between a quorum for the purpose of taking testimony and a quorum for the purpose of ruling upon his objection to the production of the subpoenaed records.[28] Senator Watkins, in overruling his "no quorum" objection, simply advised him that "[u]nder our rules, * * * one present makes a quorum" (R. 38). By failing to make a "no quorum" objection specifically addressed to the question of the power of the one-member Subcommittee to rule upon an objection to the production of subpoenaed documents, petitioner failed to give Senator Watkins an opportunity to consider that specific objection. It is possible that the Senator, had

[28] In his prepared statement delivered at the outset of consideration of the membership list question at the hearing (R. 41), petitioner said, "I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists" (R. 42). In context this cannot be said to be, and petitioner does not contend it to be, a specific request for consideration of the objection by the full subcommittee. Although the statement speaks of "members" in the plural, it was prepared in advance, presumably before petitioner knew how many Senators would attend the session.

such a specific objection been made, might have reserved for the full Subcommittee the question of petitioner's substantive objections to production, thereby eliminating the "quorum" point from the case. Compare the discussion, *infra*, pp. 69–71, of the necessity, under *Watkins*, of the making of an objection on pertinency grounds to a question whose pertinency is not entirely clear, so as to give the committee the opportunity to explain pertinency.

If, therefore, the Senate Resolution is to be interpreted as petitioner contends, he is in no better position since he failed to object to the absence of a quorum in the manner which *his* interpretation of the Resolution would require.

4. Petitioner emphasizes that "a single Senator" insisted on compliance by petitioner with the terms of the subpoena (Br. 47, 52), and implies that there is danger of abuse if the Senate Rules are construed as authorizing one-man committee quorums to pass upon a witness' objections to the production of subpoenaed records. However, petitioner's objections were necessarily considered by the Subcommittee as a whole as well as by the parent Committee on the Judiciary,[29]

[29] Petitioner's contumacy was reported by the Internal Security Subcommittee to the parent Committee on the Judiciary, which in turn reported the matter to the Senate (S. Rept. No. 1336, 82d Cong., 2d sess., to accompany S. Res. 295). At least a majority of the Committee on the Judiciary was required to take this action. See Section 133 (d) of the Legislative Reorganization Act of 1946, 60 Stat. 831 (Appendix, *infra*, p. 87, fn. 2), providing that "No measure or recommendation shall be reported from any such [standing] committee [of the Senate or House] unless a majority of the committee were actually present." [cont.]

and action by the Senate itself was required to certify the fact of petitioner's contempt to the United States Attorney for prosecution in accordance with law.[30] Furthermore, the record indicates that the Subcommittee members kept in constant touch with one another in regard to matters affecting Subcommittee affairs, particularly with respect to questions as to who would be subpoenaed (R. 55–58, 60); and, in addition, the subpoena was signed by the Chairman of the Subcommittee (G. Ex. 5, R. 63–64; R. 53) under the power conferred upon him by the authorizing resolution (see Section 2 of S. Res. 366, 81st Cong., 2d sess.; Appendix, *infra*, pp. 86–87).

V. The fact that petitioner was not in terms informed of the basis of pertinency of the records demanded is immaterial since he made no objection on grounds of pertinency

Petitioner argues (Br. 33–38) that "the conviction must be set aside because petitioner was not informed of the pertinency of the records demanded" (Br. 33). There is no merit to the argument. The fact that petitioner was not in terms informed by the Subcommittee of the basis of pertinency of the membership lists to the subject under inquiry is immaterial since he

[fn. 29 cont.]

Rule XXV (3) (a) of the Standing Rules of the Senate (Appendix, *infra*, p. 87), in authorizing each standing committee to fix the number of its members (in excess of one-third of its entire membership) who shall constitute a quorum for the transaction of its general business, specifically makes the provision "subject to the provisions of" said Section 133 (d) of the Legislative Reorganization Act of 1946.

[30] See Senate Resolution 295, 82d Cong., 2d sess. (1952), agreed to at 98 Cong. Rec. 2500, directing the President of the Senate to certify the report of petitioner's contempt to the United States Attorney for the District of Columbia.

made no objection on grounds of pertinency. And, as we have previously argued (Point III, *supra*, pp. 52–58), the grounds of pertinency were in fact clear.

In *Watkins*, this Court held that, since it is of the essence of the offense defined by 2 U. S. C. 192 that the question or questions which the witness has been asked and has refused to answer have been "pertinent to" the subject under inquiry by the committee, due process demands that, "*[u]nless the subject matter has been made to appear with undisputable clarity*" (from the totality of the circumstances attending the asking of the question, including the terms of the committee's authorizing resolution), and "*upon objection of the witness on grounds of pertinency,*" he be clearly apprised, at the time his answers are demanded, "what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it" (354 U. S. at 214–215; emphasis added).

The importance of the requirement that there be a specific objection by the witness on grounds of pertinency is emphasized by the fact that the *Watkins* decision has a footnote appended to the pertinent passage of the opinion,[21] as follows: "Cf. *United States* v. *Kamin*, 136 F. Supp. 791, 800." The *Kamin* opinion emphasized the necessity of a specific objection

[21] The passage reads: "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto" (354 U. S. at 214–215).

grounded on pertinency as follows (136 F. Supp. at 800):

> The defendant contends that it is not enough for a question to be pertinent—the witness must be informed of the subject matter, so that he may have a definite standard by which to determine whether he should answer. *Because if he was not so informed he admittedly indicated no interest, and did not choose to supplement any deficiency in his knowledge by asking either the Chairman or his own counsel, I regard this contention as immaterial.* * * * [Emphasis added.]

See also *Barenblatt* v. *United States*, 252 F. 2d 129, 134 (C. A. D. C.), pending on writ of certiorari, No. 35, this Term; *United States* v. *Miller*, 152 F. Supp. 781, 790 (D. D. C.), reversed on other grounds, August 7, 1958 (C. A. D. C.).

Thus, at the heart of the *Watkins* holding is the requirement that the witness, in order successfully to defend against a charge of willful refusal to answer questions or comply with a subpoena, must have raised the issue of lack of pertinency, by appropriate objection, at the time he was called upon to answer the questions or to produce the documents. This is a proper qualification since the purpose of the requirement is to give the committee the opportunity to explain to the witness the logical nexus between the answer or document sought and the subject of inquiry, in the event that the nexus was not "undisputabl[y]" clear already. Similarly, this Court, in *United States* v. *Bryan*, 339 U. S. 323, 333, held that a contumacious witness before a congressional committee could not

raise the objection of a lack of a quorum for the first time at her trial since the defect "could have been rectified in a few minutes." Furthermore, "[t]o deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." *Ibid.* Accord, *United States* v. *Fleischman*, 339 U. S. 349, 352.

That petitioner never objected at the Subcommittee hearing to the production of the union's membership lists on grounds of lack of pertinency to the inquiry's subject is clear, we believe, from a reading of the transcript (R. 41–50). Petitioner's attempt to squeeze from the record of the actual objections which he made at the hearing an objection based on grounds of pertinency (Br. 35–37), is patently unsuccessful. His remarks at the hearing in objecting to being required to produce the membership lists, distilled to their essence, amounted to no more than an objection on the ground that compulsory production would constitute an invasion of the union's and union members' right of privacy.[22] But this was not equivalent to objecting on grounds of pertinency, any more than invoking one's privilege against self-incrimination is equivalent to objecting on grounds of pertinency. In each case the objection proceeds on the basis of an overriding constitutional right which it is claimed must be honored irrespective of pertinency. The ob-

[22] As we have previously noted (fn. 20, *supra*, p. 53), the fact that the committee did not formally and in so many words repudiate petitioner's charge that the purpose in subpoenaing the lists was to use them as "blacklists" cannot reasonably be distorted, as petitioner attempts to do (Br. 35–36), into acknowledgment by the committee that such was its purpose.

jection indeed assumes pertinency. Petitioner, significantly, in articulating the basis of his objection in the prepared statement which he read to the committee, specifically referred to the Fourth Amendment (R. 42). A claim that evidence should be excluded or suppressed because seized in violation of the Fourth Amendment is an entirely different thing from claiming that it should be excluded because of lack of pertinency. Frequently, it is precisely because the evidence in question is pertinent that it is so vital from the movant's standpoint that it be suppressed.

Nor is there any reason for loosely treating the actual objections which petitioner made as a raising of the issue of lack of pertinency. For petitioner knew very well how to object to a question on grounds of lack of pertinency when he desired to, as the record of his later remarks before the committee reflects.[33]

The only instance to which petitioner can point in which he referred to pertinency or relevancy in connection with the membership records (see Br. 36) is a brief colloquy which he had with Senator Watkins (see *supra*, pp. 14–15) in which the Senator, appar-

[33] Queried as to who the members of the executive board of the union were, petitioner asked what the "relevance" of these names was to the committee's investigation and how the giving of names "would assist this committee in preparing legislation or enforcing it" (Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong., 1st sess., on *Subversive Control of the United Public Workers of America*, Part I, July 27, August 9, 23, 25 and 29, September 28, October 5 and 10, December 14, 1951, pp. 76, 77). After further colloquy, petitioner gave the names (*id.*, p. 77).

ently in reply to a suggestion by petitioner that the only use to which the records could be put would be "as blacklists," said (R. 49):

> May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

To this, petitioner replied as follows (R. 50):

> Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

In its context, this reference by petitioner to relevancy can hardly be construed, we submit, as a raising of the issue of pertinency in the sense contemplated by *Watkins*. Petitioner's point apparently was merely that unless the records sought were made public (as distinguished from production in executive session, solely for the committee's use), they would be "irrelevant," *i. e.*, useless, as potential "blacklists"—the use to which petitioner gratuitously had charged the committee with intending to put the records. As noted by Judge Prettyman, "In using the word 'irrelevant' Flaxer was merely expressing his view of a presentation in private. The only meaning reasonably inferrable from his answer is that if not made public the records were irrelevant" (R. 118).

In any event, so vague and ambiguous a statement can hardly be said to have put the committee on notice

that the issue of pertinency was being raised.[34] The rule is well settled that the exact nature of an objection to the receipt of evidence at a trial must be made clear at the trial to be availed of on appeal, and that a vague objection such as that offered evidence is "immaterial, irrelevant, and incompetent" will not be permitted to do service for an objection of a specific character which, if sound, could possibly have been obviated at the trial. As this Court stated in *Noonan* v. *Caledonia Mining Co.*, 121 U. S. 393, 400:

> The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done.[35]

For the same reason, the obscurely worded statement of petitioner, *supra*, on which he now relies cannot be accepted after the event as an adequate raising of the issue of lack of pertinency.

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[34] Compare the explicit objection of the petitioner in *Watkins* which this Court found had raised the issue of lack of pertinency. 354 U. S. at 185.

[35] See also, *e. g.*, *Duncan* v. *United States*, 68 F. 2d 136, 140 (C. A. 9), certiorari denied, 292 U. S. 646; *Yaffee* v. *United States*, 276 Fed. 497, 501 (C. A. 6), certiorari dismissed, 259 U. S. 590.

Finally, even if it be assumed *arguendo* that petitioner did adequately raise the issue of lack of pertinency, his argument is not thereby helped. For *Watkins* recognizes that raising the issue of pertinency has relevance only where the subject matter of the inquiry and the pertinency thereto of the question asked or document demanded have not already "been made to appear with undisputable clarity" (354 U. S. at 214) from the totality of the attendant circumstances, including but not at all limited to the terms of the committee's authorizing resolution (*id.* at 208–215). For the reasons previously advanced (see *supra,* pp. 52–56), both the subject of inquiry and ~~the~~ the rational connection between it and the records sought had been made to appear with the requisite degree of clarity in this case. And the record reflects, furthermore, that petitioner was well aware of both. As noted by Judge Prettyman, "Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the subpoena he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry. He refused to produce the membership lists but not upon the ground they were not pertinent. He objected on the ground that the Government as an employer is not entitled to know which of its employees belong to unions * * *" (R. 117).

VI. Petitioner was clearly ordered to produce the subpoenaed records pursuant to the subpoena; his reliance on the *Quinn* decision is, accordingly, misplaced

Petitioner's final argument (Br. 52–54) is that his conviction cannot be sustained in the light of this Court's holding in *Quinn* v. *United States*, 349 U. S. 155, 165–166,[36] that "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question"[37] (*id.* at 166).

He argues (a) that, although he was (concededly) ordered at the October 5th hearing to produce the membership lists *after* the committee had heard his objections, the net effect of the colloquy which followed was that the committee abandoned its insistence that he produce the lists under that order and, instead, granted him an additional ten days' grace within which to produce them (Br. 52–53, 54), and (b) that the fact that he did not produce the lists within this grace period either (and in fact never produced them) is immaterial to the validity of his conviction for refusing to produce them on October 5th—the offense charged (Br. 53). We contend, on the other hand, that the record supports the jury's finding (and the Court of Appeals' view) that petitioner committed a completed contempt on October 5th, even though the

[36] See also *Emspak* v. *United States*, 349 U. S. 190, 202; *Bart* v. *United States*, 349 U. S. 219, 222–223.

[37] While *Quinn* involved a refusal to answer questions, it is not disputed that its rationale is equally applicable to a refusal to produce documents pursuant to a subpoena *duces tecum*.

committee, in a new order, thereafter directed him to produce the lists within ten days from that date.

1. As indicated in the Statement (*supra*, pp. 10–13), and as pointed out in the original majority opinion of the Court of Appeals (R. 99–100), the committee, after having been fully apprised by petitioner of his objections to producing the membership lists in accordance with the terms of the subpoena, told petitioner (R. 47, 100):

> You are directed by the committee to produce those records according to the terms of the subpena.

Thus, as noted by the Court of Appeals, "[a]fter consideration of his objections to the validity of the subpoena, Flaxer was unmistakably directed to produce the membership list" (R. 99). The rule of the *Quinn* case, *supra*, was clearly complied with. Petitioner knew that his objections had been considered and overruled, and that he was being ordered to produce the records demanded notwithstanding those objections. Consequently, petitioner's reliance and that of dissenting Judges Edgerton and Bazelon (R. 110–113, 120) on the *Quinn* case is, we submit, misplaced.[35]

It is true that petitioner, after further colloquy with the committee, was ordered to produce the rec-

[35] *United States* v. *Kamp*, 102 F. Supp. 757 (D. D. C.), which petitioner says involved a "substantially identical" factual situation (Br. 54), is, on the contrary, clearly distinguishable. As the opinion in that case makes clear (at 759), the committee never overruled the witness' objections to producing the records called for by the subpoena, and never ordered him to produce after he had made his objections.

ords within ten days from that date (*supra*, pp. 14–15; R. 50). But at no time did the committee suggest that it had rescinded its original order, or that petitioner's original refusal to produce had been excused. The later order of the committee is entirely explainable on the ground that, being vitally concerned with obtaining the records sought, it was making a fresh attempt to do so. As observed by the Court of Appeals (R. 101),

> It was not until after the appellant had been directed, despite his protest, to produce the records according to the terms of the subpoena, that the chairman ordered him to assemble the information and transmit it to the subcommittee in ten days. Obviously this was because the subcommittee still wanted the information which had been contemptuously withheld from it at the hearing. But the chairman nowhere receded from his earlier ruling that the subpoena was to be complied with, which ruling was given after the witness had said he did not have the records with him. Senator Watkins said nothing which can be construed as excusing or condoning Flaxer's contempt—already complete—in disobeying the subpoena. [Footnote reference omitted.]

2. To be sure, it is unlikely that petitioner would have been cited for his contempt of October 5th if he had obeyed the committee's second order—to produce the records within ten days. In that event, he could be considered to have accepted in effect an opportunity, extended to him by the committee, to purge himself of his initial contempt. But since petitioner did

not in fact produce the records within the ten-day period (or, indeed, at any time), there is no need to theorize as to what the legal effect would have been of compliance by petitioner with the second order.[39] As noted by the Court of Appeals (R. 101–102):

> If Flaxer had demonstrated good faith by compiling the membership records and sending them to the subcommittee within ten days, perhaps he would not have been indicted for his initial contempt. On that supposition some may think Senator Watkins—although he did not promise immunity in that event—was affording Flaxer an opportunity to purge himself of contempt. If so, it was an opportunity the appellant did not embrace. He remained recalcitrant, thus affirming and emphasizing the contempt he had originally displayed. That he may have committed another contempt in addition to that of October 5 would seem to be irrelevant.

See also the remarks of the trial judge at R. 16–17.

3. The jury was instructed, at petitioner's request, that (R. 91–92)

> * * * you cannot find that the defendant willfully and deliberately refused to produce the records called for by the subpoena unless you first find that the defendant clearly understood

[39] Since, under *Yates* v. *United States*, 355 U. S. 66, 73, "the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers," it would appear that petitioner's continued refusal to produce the membership lists constituted a single contempt. All that took place after October 5th, therefore, was that petitioner, already in contempt, continued in that status.

that the subcommittee had rejected the arguments advanced by the defendant and required him to produce the records on October 5, 1951, despite those arguments.

Whether the refusal and failure to produce was willful must be determined as of the time that the failure and refusal took place, and that time is specified in the indictment as October 5, 1951. What happened later is immaterial and has no bearing upon the issues of this case except as it may reflect on what the defendant did on October 5, 1951; that is, whether there was a refusal or was not a refusal to produce the records on October 5th, and if there was a refusal, whether the refusal was willful or otherwise.

Thus, implicit in the verdict of guilty was a finding by the jury that petitioner knew he had been ordered to produce the records on October 5th and deliberately refused to do so. Since a jury's verdict must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it (*Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664), it is submitted that on the basis of this record the jury's finding on this issue must be accepted as dispositive.

VII. Since petitioner deliberately disabled himself from producing the membership lists by not bringing them to the hearing, thereby evidencing his intent not to produce them under any circumstances, he had no standing at his trial to rely upon grounds for refusal to produce which were related solely to events occurring at the hearing

In Points IV, V, and VI, *supra*, pp. 59–68, 68–75, 76–80, we have answered, on their merits, petitioner's contentions that his conviction must be set aside be-

cause of events which did or did not take place at the hearing itself. There is, however, a basic reason why none of these grounds was properly available to petitioner at his trial and why, consequently, none needs to be considered by this Court at this time.

That reason is the fact that none of these grounds was the basis for petitioner's refusal to produce the records. Petitioner was served with the subpoena calling for these records on September 19, 1951 (R. 37). He appeared before the Subcommittee on the return date, which was October 5, 1951 (R. 36, 37). The time which elapsed between these dates was, by petitioner's own admission, more than enough to have enabled him to prepare the called-for membership lists.[40] But petitioner took no steps towards assembling the lists requested and appeared before the committee on the return date without them (R. 39, 42, 47). He thought the committee's demand for the lists was "an improper command," he told the committee; "That is the reason I haven't got them" (R. 47). In other words, petitioner, deliberately and in advance, rendered himself unable to comply with the terms of the subpoena, thus evidencing his intent not to produce the lists under any circumstances. In the words of the Court of Appeals (R. 101):

> He deliberately refrained from making the compilation, from which it is apparent that he had decided in advance he would not obey in any circumstances.

[40] Petitioner testified at the hearing that the data could be assembled within a week's time (R. 49).

Even if, to petitioner's satisfaction, the full Subcommittee had been at the hearing (Point IV), and had fully explained to him exactly how the lists were pertinent to the subject under inquiry (Point V), and had categorically directed that he deliver the subpoenaed lists then and there (Point VI), he would still have refused to do so—indeed could not have done otherwise in view of his failure to equip himself in advance—because, having regarded the demand as an "improper command," he had made up his mind not to comply with this portion of the subpoena under any circumstances although he complied with other portions of the subpoena.

This being the posture of the case at the time of petitioner's trial, the Government contends, on the authority of *United States* v. *Bryan*, 339 U. S. 323, that none of the three above-mentioned grounds was properly available to him at his trial or need be considered now. In other words, petitioner was validly found guilty of contempt regardless of what possible merits any of the foregoing grounds might have had if they had been the true basis of petitioner's refusal since he had made clear that he would refuse to produce the membership lists in any event.

Bryan held (339 U. S. at 327–335) that a witness who, having been subpoenaed to appear and produce records before a congressional committee, appears but refuses to produce the records, may not, on his subsequent trial for willful default, defend on the ground that a quorum of the committee was not present when the default occurred—he having not relied on the absence of a quorum at the time of his appearance be-

fore the committee and as a reason for his default, and it being apparent that he "would not have complied with the subpoenas no matter how the Committee had been constituted at the time" (at 333–334). "Here respondent would have the Committee go through the empty formality", the Court observed in rejecting Bryan's argument, "of summoning a quorum of its members to gather in solemn conclave to hear her refuse to honor its demands" (at 334). See also *United States* v. *Kamin,* 136 F. Supp. 791, 793–794 (D. Mass.).

Bryan cited two earlier decisions of this Court, *Hale* v. *Henkel,* 201 U. S. 43, and *Bevan* v. *Krieger,* 289 U. S. 459. In the *Hale* case, the witness had based his refusal to produce documents on three grounds, one of which was that it was "impossible for him to collect them within the time allowed" (201 U. S. at 70). The Court indicated that it would not consider this objection because, "[h]ad the witness relied solely upon [this] ground, doubtless the court would have given him the necessary time" (*ibid.*). In *Bryan,* this Court, alluding to this holding of the *Hale* case, observed (339 U. S. at 334):

> [H]aving refused compliance for other reasons which the lower court could not remedy, the witness could not later complain of its refusal to do a meaningless act—to grant him additional time to gather papers which he had indicated he would not produce in any event.

In the *Bevan* case, this Court, observing that a witness' declaration that he "would answer no further questions" would "in any court * * * be sufficient

ground for his commitment without further or other hearing," said that "[s]uch an attitude indicates no desire for a hearing upon the propriety of the questions, but on its face constitutes a contempt" (289 U. S. at 465).

The *Bryan, Hale,* and *Bevan* cases thus stand for the proposition that a witness' objections to questions or to demands for production should be considered by the courts only where it appears that he would have answered the questions or produced the records but for those objections, and they make clear that this Court will not reverse a conviction for contempt on a ground which was not the real basis for the witness' refusal to answer or to produce.

Here, as in *Bryan,* petitioner relied solely upon a ground for refusing to produce which the Subcommittee could not have cured—*i. e.,* the asserted right of a union to keep its membership list private. He accordingly, as in *Bryan,* had no standing at his trial—and has none now—to rely upon grounds for refusal to produce which were not his true grounds.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Statute, Resolution, and Rule Involved

2 U. S. C. 192 (Rev. Stat., § 102, as amended) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Senate Resolution 366, 81st Cong., 2d sess., adopted December 21, 1950 (96 Cong. Rec. 16872; see also R. 32–33), provides in pertinent part:

> Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and
>
> Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and
>
> Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination

and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

Whereas it is vital to the internal security of the United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws;

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

SEC. 2. The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and, within the amount appropriated therefor, to make such expenditures as it deems advisable. * * * Subpenas shall be

issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.

A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

* * * * *

Rule XXV (3) of the Standing Rules of the Senate, as amended by Senate Resolution 180, 81st Cong., 2d sess., adopted February 1, 1950 (96 Cong. Rec. 1284; see also R. 31), provided at the time pertinent hereto (October 5, 1951) [1]:

(3) (a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is authorized to fix the number of its members (but not less than one-third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee, subject to the provisions of section 133 (d) of the Legislative Reorganization Act of 1946.[2]

(b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

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[1] Unless changed, the rules of one session of the Senate carry over into the next (R. 35).

[2] Section 133 (d) of the Legislative Reorganization Act of 1946 (60 Stat. 831) provides:

"(d) No measure or recommendation shall be reported from any such [standing] committee [of the Senate or House] unless a majority of the committee were actually present."

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